

REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. 2011-76724

HARRIS COUNTY, TEXAS,
Plaintiff, and THE STATE OF
TEXAS, acting by and through
The TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY, a
Necessary and indispensable
Party

v.

INTERNATIONAL PAPER COMPANY,
MCGINNES INDUSTRIAL
MAINTENANCE CORPORATION,
WASTE MANAGEMENT, INC., AND
WASTE MANAGEMENT OF TEXAS,
INC., *Defendants*.

* IN THE DISTRICT COURT OF

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* HARRIS COUNTY, T E X A S

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* 295TH JUDICIAL DISTRICT

REPORTER'S RECORD

DAILY COPY

OCTOBER 29, 2014

On the 29th day of October, 2014, the trial came on
to be heard in the above-entitled and -numbered cause;
and the following proceedings were had before the
Honorable Caroline Baker, Judge Presiding, held in
Houston, Harris County, Texas:

Proceedings reported by computerized stenotype
machine; Reporter's Record produced by computer-assisted
transcription.



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OCTOBER 29, 2014

(Whereupon, the following proceedings are outside the presence of the jury:)

THE COURT: All right. We're on the record. Mr. Benedict.

MR. BENEDICT: The stipulation that I understand the parties have agreed to is that they stipulate that a reasonable attorney's fee for the TCEQ's attorneys in the Texas Attorney General's Office in this case through trial is \$866,000, an even amount, exactly \$866,000.

Defendants and the TCEQ agree that the defendants do not stipulate that the TCEQ is entitled to recover fees as a legal issue, and that issue is reserved for the Court to determine at a later date.

The stipulation also encompasses reasonable attorney's fees on appeal, which the parties stipulated for representation to appeal for the court of appeals at \$26,500; for representation at the petition for review stage in the Supreme Court, \$8,000; and for representation at the merits briefing stage and oral arguments in the Supreme Court, \$26,500.

That is the stipulation. I think we have an understanding, since I represented to the jury they

1 would be hearing evidence, that we just tell them that
2 that issue is something they no longer have to worry
3 about, so they aren't expecting me to do something and I
4 didn't live up to it. But I think that's the
5 stipulation. That's all it is. The legal issue is
6 reserved for the Court.

7 THE COURT: Mr. Reasoner.

8 MR. REASONER: Waste Management of Texas
9 agrees with the stipulation.

10 MR. CARTER: So agreed, Judge.

11 MS. HINTON: MIMC agrees with the
12 stipulation, Your Honor.

13 THE COURT: Thank you.

14 So, then, how do you propose we do that
15 with the jury, if at all?

16 MR. CARTER: That doesn't need to go to the
17 jury at this point.

18 THE COURT: Right.

19 MR. BENEDICT: Right. And I think simply
20 telling them that the TCEQ has resolved -- our agreement
21 is worked out, so they will not have to consider the
22 TCEQ's attorney's fees.

23 MR. CARTER: I don't know that there's any
24 issue that needs to be addressed.

25 THE COURT: I think -- that's why I asked

1 the question. I think their point is that we just won't
2 be submitting that issue to the jury.

3 MR. BENEDICT: I agree. My concern is
4 simply I told them we would be putting on evidence and
5 they may not hear any now and think that I didn't live
6 up to something. I'm not asking any comments on the
7 merits or amounts or anything, just that they aren't
8 going to have to decide that anymore.

9 THE COURT: The problem is if I say that,
10 then I have to say the other part, which is that they're
11 not waiving their argument about whether or not you're
12 legally entitled to them; and I really don't want to say
13 that to the jury.

14 MR. BENEDICT: You can simply say that "The
15 parties have agreed that the Court is going to resolve
16 the attorney's fees; and you don't have to," something
17 like that.

18 MR. REASONER: I just don't want any
19 implication that we're agreeing they're entitled to
20 anything or that you're finding that we're liable for
21 anything.

22 MS. HINTON: That's what worries me.

23 THE COURT: Let's go off the record for a
24 second.

25 (Whereupon, after a discussion off the

1 record, the following proceedings were had:)

2 THE COURT: Back on the record. I think
3 the agreement is so that there is not any implication
4 one way or another and that all parties' positions are
5 protected on this issue, that the Court is simply,
6 before Mr. Benedict rests, is going to let the jury know
7 that the parties have agreed to submit the TCEQ's
8 attorney's fees issue to the Court.

9 MR. CARTER: Judge, I think that that
10 should come from you rather than the parties,
11 themselves.

12 THE COURT: Right. I will say that.

13 MR. CARTER: Yes. And that -- and that
14 will remove the TCEQ from also having any closing
15 argument on this.

16 MR. BENEDICT: I disagree on that. I think
17 I get to respond to allegations about what TCEQ did or
18 didn't do. There are State issues in the case.

19 THE COURT: What about the stipulation? If
20 the stipulation is entered, do you think there is a
21 necessity for closing at that point?

22 MR. BENEDICT: There's more than that that
23 was said. I think I can close on that and talk about
24 the stipulation, that the allegation is made, they have
25 invited a comparison; but there were also accusations

1 that the TCEQ overreached.

2 MR. CARTER: Then we don't have a
3 stipulation, Your Honor. If that stipulation doesn't
4 take care of that issue that was not addressed by
5 International Paper, and if that issue has not been
6 resolved by his stipulation that International Paper is
7 voluntary agreeing to, we do not have a stipulation.

8 MR. BENEDICT: I'm not waiving a closing.

9 THE COURT: I hear two different issues
10 being raised. One is if there's a stipulation about
11 what the TCEQ did do, then there's no need to discuss
12 that further. That's one argument. Then you had a
13 separate point, I think you were making, that you feel
14 like you should be able to respond to a suggestion that
15 the TCEQ is overreaching.

16 MR. BENEDICT: It's actually a little more
17 than that on the first one. It was that TCEQ didn't do
18 anything. The stipulation says they did this. But they
19 also invited a comparison of what defendants do. And I
20 do intend to argue from some of the defendants'
21 documents the information request.

22 I'm going to be offering -- I think we have
23 redacted copies of those that are coming in about what
24 their response was, or at least MIMC's response to what
25 information requests were.

1 And then there were allegations not just
2 that the government, but they specifically said Harris
3 County and the TCEQ are overreaching on penalties. The
4 TCEQ is a party. I think we get to close on issues and
5 allegations related to the State.

6 THE COURT: So let's put to the side for a
7 moment an argument about overreaching. Their position
8 is, regardless of any stipulation, that doesn't address
9 the overreaching argument and they should be, at the
10 very least, able to close on that.

11 MR. BENEDICT: That's evidence. I get to
12 argue the case, like anybody else on an evidentiary
13 point.

14 MR. CARTER: But that's not evidence. What
15 was said in opening statement is not evidence. And so
16 as a result, there hasn't been any evidence presented in
17 the case on that issue. That happens all the time.
18 People say things in opening statement where there's no
19 evidence on it.

20 THE COURT: Is he entitled to say in
21 closing, "You were told in opening that the TCEQ was
22 overreaching and you didn't hear any evidence on that"?

23 MR. BENEDICT: Yeah.

24 THE COURT: Is he not entitled to say at
25 least that?

1 MR. CARTER: If he wants to say that and
2 sit down, then --

3 THE COURT: So let's assume for purposes of
4 this discussion that I think you should at least be able
5 to close on that issue. Now the question becomes, if
6 there is a stipulation on the other point, do you get to
7 say more about that? Generally, when there's a
8 stipulation, that means that's an issue that's not in
9 dispute, so there is no further comment about it.

10 Now you have a separate argument that you
11 ought to be able to reference some of these documents
12 about what you think the defendants didn't do.

13 MR. BENEDICT: Yes.

14 THE COURT: And that's from some of the
15 documents you're going to offer?

16 MR. BENEDICT: That's correct. The ones we
17 talked about last week that we have redactions on, the
18 information request and their response.

19 THE COURT: Okay.

20 MR. WOTRING: If I may. To the extent they
21 want to say that the stipulation takes things out of
22 further commentary or further -- further testimony or
23 evidence, they've got in their proposed slides for Bob
24 Zoch, they have a stipulation. Evidently they want to
25 get him on the stand to talk about the stipulation,

1 itself, and where the penalties are going.

2 So to the extent the argument is -- the
3 stipulation resolves any and all further commentary on
4 it, we need to talk about the scope of the testimony for
5 Mr. Zoch.

6 THE COURT: Well, I think what they're
7 saying is, like you do with any witness when there's a
8 stipulation, you understand this is an agreement of the
9 parties. I don't think anybody has a problem with that.
10 It's if you take a stipulation and then you add to it or
11 change it, then that defeats the purpose of the
12 stipulation, which is what I think the defendants'
13 objection would be if you were to do that in closing.

14 I don't think the stipulation in and of
15 itself addresses what the defendants did or didn't do,
16 and I think that's a different issue.

17 MR. BENEDICT: And I understand I'm not
18 entitled to vary what the stipulation is; but it's
19 argued, like -- I mean, during the opening statement,
20 people discuss stipulations. It's part of the evidence
21 of the facts of the case. That's what's stipulated, and
22 I'm entitled to apply it as it relates to the arguments
23 being made in the case.

24 THE COURT: Remind them of the stipulation?

25 MR. BENEDICT: Yes.

1 THE COURT: So then the second question
2 that was raised was the issue with regard to the
3 documents that they're going to introduce, shouldn't he
4 be able to at least argue those?

5 MR. STANFIELD: We haven't necessarily
6 agreed for International Paper that he can offer those,
7 much less offer pure attorney argument on it. He
8 doesn't have a sponsoring witness. He has no disclosed
9 witness to come testify. It would be trial by ambush to
10 say "Let me put in documents and then offer pure
11 attorney argument on what they mean."

12 We haven't been able to depose a TCEQ
13 witness on this topic because, of course, they weren't
14 listed on his "will call" list, which is an agreement
15 the attorneys reached before trial. So now the TCEQ
16 wants to come in, offer documents just on their face,
17 without us being able to take a TCEQ witness on the
18 stand on those documents and then argue what they mean
19 to the jury. To us, that seems improper because we
20 would need to be able to have a sponsoring witness with
21 personal knowledge who we could depose before that issue
22 comes into the trial.

23 MR. BENEDICT: Several responses. I don't
24 guess the TCEQ anticipated being accused of doing
25 nothing in opening statement. In fact, if you look at

1 Bob Allen's deposition, there were questions where the
2 defendants are saying I was comparing what Harris County
3 did as against TCEQ and Parks & Wildlife, all the others
4 who were doing something. So we're entitled to respond
5 to that. The fact that we didn't have a witness to
6 respond to an argument we didn't know was going to be
7 made on a "will call" list would be kind of bizarre that
8 I would have been that clairvoyant to know that.

9 THE COURT: Well, I think that is taken
10 care of by the stipulation, and just so you don't have
11 to stand up and argue again about the opening statement
12 being about dredging, I think that's taking --

13 MR. REASONER: You anticipated where I was
14 going.

15 THE COURT: I think that is taken care of
16 by the stipulation. The second argument is how do these
17 other exhibits come in without a sponsoring witness?

18 MR. BENEDICT: And we discussed that last
19 week. They're certified copies. They also -- we talked
20 about authenticity under the hearsay rule, under the
21 business records, and to the extent there are
22 investigations -- public investigations. And I
23 understood there was no issue.

24 I had a witness ready to come down. We
25 talked about calling the project manager, and I think we

1 agreed that wasn't necessary. We had him stand down.

2 MR. REASONER: To be clear, we said we're
3 not going to object to hearsay, but we're not saying
4 these documents are relevant. Mr. Stanfield's concern
5 is very justified when the only evidence that they will
6 hear about this is counsel's argument in closing, saying
7 whatever he wants about the documents, unsponsored by
8 any witness, the stipulation --

9 THE COURT: What if he's simply referencing
10 the documents as written, as opposed to interpreting
11 them, because that's how I think he's offering them?

12 MR. BENEDICT: I intend to just read, for
13 instance, and I think it's 154, MIMC's response. That's
14 already in evidence. I would intend to read the answer.

15 THE COURT: "We sent this to MIMC. This
16 was their response." He's not going to comment further,
17 because I don't disagree with you about that if you
18 don't have a witness you can cross about what it means.
19 But if it's just a document that's being admitted and it
20 says what it says and he just references what it says, I
21 don't think that in and of itself is improper, is it?

22 MR. REASONER: Well, I guess I would be
23 surprised to hear a lawyer ever just read a document and
24 then not argue based on it or try to suggest to the jury
25 what the proper interpretation of that document is.

1 THE COURT: Beyond saying "We sent them a
2 request and this was the only way they responded"?

3 MR. BENEDICT: Reading the question, they
4 responded, then arguing that that's not doing anything.
5 You can make the argument, interpreting, that's a
6 different issue than arguing. And I get to argue --
7 argue about the effect of what they did or didn't do. I
8 can't interpret it. I understand that. I don't have a
9 witness. But reading their words and then arguing why
10 that's important, I think that's fair.

11 THE COURT: Depending on how you do it, I
12 think that's not inappropriate, as long as you're not
13 interpreting the document.

14 MR. REASONER: And, Your Honor, again,
15 what's inappropriate is to transform what their role is
16 without witnesses based on an argument that "They did
17 nothing with respect to dredging," which they didn't.
18 He's never -- he can't debate that or dispute that.
19 They didn't for three and a half years.

20 So to then transform and say he gets that
21 kind of a freeform pretending to be a witness in
22 closing, "Let me talk to you about documents that you
23 have not seen before" --

24 THE COURT: Well, let's say that you hadn't
25 said it that way in opening. Wouldn't Mr. Benedict be

1 able to introduce these documents?

2 MR. STANFIELD: Through a witness.

3 THE COURT: He can't just introduce --
4 well, I thought you-all were not objecting to their
5 admissibility. You might be objecting to their
6 relevance, but you weren't objecting to their
7 admissibility in terms of the form, etcetera?

8 MR. REASONER: Yes. We're not making him
9 have someone come here and say they're business records
10 or official records for hearsay purposes.

11 THE COURT: So why wouldn't he always be
12 able to introduce them as exhibits and just reference
13 them as the TCEQ?

14 MR. REASONER: Right. If they're relevant
15 documents -- Mr. Stanfield's point is through a witness.

16 MS. HINTON: Your Honor, I'm also befuddled
17 about --

18 THE COURT: Why does he have to have a
19 witness if you aren't objecting to the admissibility?

20 MR. BENEDICT: The document is the
21 evidence.

22 THE COURT: Unless he's having someone
23 interpret it, I agree with you on that. But if he's
24 just saying, "Here's this document and it says X and we
25 believe that's evidence that the defendants didn't

1 respond," or something like that.

2 MS. HINTON: Your Honor, why do we have
3 witnesses, then? We could have just piled up all of our
4 exhibits, our pre-admits, and then argued to the jury
5 what the documents say, read them to them. We need a
6 witness. But, in addition, we're somewhat befuddled
7 about what this MIMC response to the information request
8 is that's in evidence. We don't believe there is an
9 Exhibit 154.

10 MR. BENEDICT: Did I misstate the number?

11 THE COURT: We'll look back at the exhibits
12 that you were going to proffer.

13 MS. HINTON: We're befuddled about the
14 document, itself, much less the fact that it's going to
15 be an argument about the document.

16 MS. GRAY: And I would like to respond to
17 the Court's question that if the statement hadn't been
18 made in opening, and of course we don't agree with how
19 they characterize that --

20 THE COURT: I understand.

21 MS. GRAY: -- but that takes us back to the
22 pretrial hearings with regard to the fact that TCEQ has
23 not joined in the Harris County claims and Mr. Benedict
24 told the Court that the only role that the TCEQ was
25 going to play was to prove up its attorney's fees.

1 And now that we have a stipulation on that,
2 there wouldn't be any role or any need for the TCEQ to
3 have a closing -- a role in closing argument, because
4 their issue is now before the Court and not before the
5 jury.

6 MR. BENEDICT: Your Honor, I don't think
7 I've ever said we're limited to attorney's fees. We
8 have that claim, but I don't think -- I said I don't
9 intend to get up and say that, but I'll address issues
10 that affect TCEQ or the State. I think I've always been
11 clear on that.

12 As I pointed out, we are joined at the hip
13 because we get half the penalties. There wouldn't be
14 anything improper if I was up here every witness
15 questioning. We typically don't do that, but in this
16 case there are issues that have been raised specific to
17 TCEQ, I'm entitled to respond. I'm a party.

18 THE COURT: So are you-all or are you-all
19 not requiring Mr. Benedict to have a sponsoring witness
20 of the documents, because I understood you were not
21 objecting to the admissibility?

22 MS. HINTON: I have to see what the
23 documents are.

24 THE COURT: Okay. Let's go through the
25 documents, then.

1 MS. HINTON: I've never seen it.

2 MR. BENEDICT: Number one, and this is one
3 that they haven't seen yet. I notified them last night.
4 It's a negative certification under TCEQ under 803.10,
5 the Absence of Public Records. It's in the form in
6 accordance with Rule 902 for authentication. Harris
7 County asked for this. I just forgot it was there. It
8 is a negative certification that there was no discharge
9 permit. That may no longer be an issue, but I don't
10 know if there's any evidence.

11 THE COURT: I don't think that's an issue.

12 MR. BENEDICT: And I would have that.

13 MR. CARTER: We would object.

14 MR. STANFIELD: We would object.

15 THE COURT: No. What I'm saying is, I
16 don't think that's an issue, so I don't think that
17 exhibit is necessary. Nobody is suggesting that there
18 were applications.

19 MR. BENEDICT: That's why it was retrieved,
20 just in case there was. And then we have the two
21 July 28th, 2006 letters from TCEQ, one to MIMC, one to
22 Waste Management, information requests that we discussed
23 last week that we have redacted copies for the Court
24 that I would put in as the exhibit. I may offer the
25 unredacted in a separate bill of exceptions.

1 THE COURT: Will you show those to
2 Ms. Hinton, and I think there's one for MIMC and one for
3 Waste Management?

4 MR. BENEDICT: MIMC and Waste Management,
5 yes. I think we had shared those last week, copies of
6 them, and redactions.

7 THE COURT: You did, but if you'll show
8 them now, if you don't mind, with the redactions. And
9 to remind everybody what we did with that, was we took
10 out all the parts except the list of -- I think -- as I
11 recall, the list of requested items, or something like
12 that. Just look at them and see what you-all think
13 about that.

14 MR. GIBBS: Your Honor, one issue here.
15 One difficulty that arises from the absence of any
16 witness, for example, and permitting a lawyer to get up
17 and pontificate and interpret a document that's
18 otherwise not sponsored is this: I think Mr. Reasoner's
19 point in opening and otherwise was that we're not -- as
20 we've established, we're not charging him with a
21 liability accusation.

22 It was simply and restricted to the notion
23 in support of the idea that we were reasonable in our
24 response in the face of dredging out there occurring
25 over a span of a couple of decades. And the absence of

1 any regulatory prohibition or activity and/or the
2 continuation of permitting of that. So it was dredging
3 only, inactivity by the regulator with respect to
4 dredging that was pointed out as a context in which our
5 conduct was naturally reasonable and not -- and assuming
6 that there was not an issue there.

7 As I understand it, they want to put in, in
8 response to that, "Oh, well, not limited to dredging and
9 what they did or didn't do with respect to dredging,"
10 but here we did other things unrelated to dredging, some
11 broader notion of what we were doing out there. We
12 never -- we never made the statement, "Well, you didn't
13 do anything out there with respect to it." We were
14 talking about dredging. And so --

15 THE COURT: I don't disagree with you. I
16 think that's what the stipulation addresses, that any
17 concern that would have come from the presentation in
18 opening statement. I think what Mr. Benedict is saying
19 is separate and apart from that. He believes as the
20 State, he should be able to put these documents into
21 evidence to show what the defendants were or were not
22 doing; and I haven't ruled on those yet. We talked
23 about redactions, and I want to let you-all look at
24 them.

25 And what I'm trying to determine from the

1 defendants is are you saying you don't agree to him
2 putting them into evidence without a sponsoring witness
3 or you do, and you have other objections to the
4 documents. So I think that's where we are. I don't
5 think these are in response to the opening statement.
6 These are separate and apart with regard to what you
7 feel the defendants did or didn't do.

8 MR. BENEDICT: And I think that was
9 something that invited the comparison in opening
10 statement. So it is in response to --

11 MR. GIBBS: That is precisely my point.

12 THE COURT: So I do not think -- and I've
13 looked at that opening statement several times. I do
14 not think that counsel for Waste Management invited a
15 comparison in a negative way, meaning that something the
16 TCEQ did was wrong. I think they were putting it in the
17 light that we've discussed before, which is that "What
18 we have done is reasonable because other people were
19 doing the same reasonable thing."

20 I did understand, however, your concern,
21 Mr. Benedict, that even with it limited to dredging,
22 that one of the things the TCEQ did is they may not have
23 said, "No, don't dredge," but they did something else
24 instead, which they believed would ultimately lead to a
25 more permanent result.

1 MR. BENEDICT: Yes.

2 THE COURT: So, to me, that would be
3 responsive to that opening statement, even if it were
4 confined to dredging; and that is why I talked to you
5 further about that and you-all were working on a
6 stipulation. But I don't think that the opening
7 statement invited a comparison in the way you're framing
8 it between the defendants and the TCEQ.

9 MR. BENEDICT: I think there was even a
10 statement of comparing in realtime what they did and
11 invited -- and where it's going, these letters,
12 Mr. Cedilote, you know, is the one who wrote the report.
13 That's not in the stipulation. As part of that process
14 he sent these information request letters to MIMC and
15 Waste Management, and we have the MIMC response where a
16 year after the fact MIMC is essentially saying, "We
17 don't know anything about this site. We've never
18 operated it. We don't have any records at all."
19 And so while TCEQ is doing the investigation, defendants
20 are still giving -- or at least MIMC is giving
21 information to TCEQ, "We don't know anything about this
22 place." And I think that has been invited. I think
23 it's relevant, and it also goes back to the state of
24 mind of the Exhibit No. 8 e-mail from Mr. Cedilote where
25 he apologizes for the heartburn. I think it's

1 responsive to that. And I think I'm entitled, those are
2 TCEQ issues, to make this.

3 THE COURT: His argument is separate and
4 apart from the opening statement. He believes he ought
5 to be able to raise these issues in response to Exhibit
6 No. 8, the Cedilote e-mail.

7 MS. HINTON: I need to see the MIMC
8 response also, since it's not on the pre-admit list.
9 But looking at this document from July 28, 2006, even in
10 its redacted form, it's incredibly misleading to the
11 jury.

12 I'll tell you, it is a request and
13 opportunity to conduct response actions and information
14 requests. In the redacted form it clearly creates the
15 implication that MIMC is being asked about this
16 property, giving a legal description to let the jury
17 think that MIMC owns this property. MIMC does not own
18 this property. It's not record titleholder, and this
19 has nothing to do with the comments that were made in
20 opening statement about they weren't doing anything
21 about the dredging.

22 They were part of this response action and
23 info request to McGinnes, but these letters have nothing
24 to do with opening statements; and as redacted, are
25 incredibly misleading to this jury with this real

1 property description in the information request.

2 MS. BALLESTEROS: And, Your Honor, also,
3 these would open the door to all of the Superfund
4 information in the case that we have kept out until now.
5 This would require us to come back and respond and put
6 in the response to this letter and all of this lead down
7 the road to the Superfund issue, and that has been
8 expressly carved out of the case. None of this has
9 anything to do with dredging. And all Mr. Benedict
10 wants to do is sort of have the suggestion in there that
11 they were doing things, but the response to this would
12 be, "Well, let's -- let us put in the response to the
13 Superfund issue," and that's been off limits in this
14 case.

15 THE COURT: So I guess the question for
16 you, Mr. Benedict, is, once again, it would be one thing
17 if MIMC or Waste Management were taking the position
18 that they did certain things at the Site, you know, to
19 take care of it or address it or maintain it; but they
20 have consistently taken the position that "We don't have
21 a duty to do that and that we didn't do anything with
22 regard to this Site. We didn't continue to monitor it.
23 We didn't see what was going on with it. We didn't
24 think we had any obligation to do so."

25 MR. BENEDICT: That's not what the answers

1 say. They say they don't even know about the Site.

2 MS. HINTON: And, of course, they don't,
3 Your Honor, because MIMC was not the record titleholder.
4 And the memo he referenced --

5 THE COURT: May I see the unredacted copy
6 of the letter?

7 MS. HINTON: Only talks about ownership of
8 the property, that they have discovered, in fact, that
9 MIMC did not own the property. That is all that memo
10 referred to. This is a full-blown investigation, and
11 with that real property description that is incredibly
12 misleading and nothing to do with the arguments made in
13 opening statement. And to echo Ms. Ballesteros, we're
14 headed down the road of the whole EPA.

15 MR. REASONER: It's two separate issues,
16 Your Honor. The fact that they were involved in a study
17 is one thing.

18 THE COURT: Right.

19 MR. REASONER: What he wants to now get
20 into is to say they weren't very quick in their response
21 and the back and forth and a lawyer sent a letter. It's
22 the whole back and forth of the Superfund issue, which
23 has nothing to do with what's been before this jury.
24 It's totally separate from the "we did a study"
25 stipulation.

1 MR. BENEDICT: TCEQ is sending requests for
2 information and being told "We never operated the
3 defendant site. We don't know anything about it;" and
4 that, I think, is relevant.

5 THE COURT: What is that relevant to?

6 MR. BENEDICT: Going back to they invited a
7 comparison in realtime with what the TCEQ did and what
8 the defendants were doing. TCEQ started their
9 investigation, they're making information requests, and
10 defendants are saying -- or I say "defendants," MIMC is
11 saying "We didn't even operate" --

12 THE COURT: Well, there's no -- the whole
13 purpose of the stipulation is so that there's no
14 impression left with the jury that TCEQ did nothing in
15 response to the issue about dredging; and the details in
16 that stipulation make it clear that TCEQ did quite a
17 bit.

18 Why is it then necessary to talk about how
19 long the investigation took or what the process was
20 like? The point you're trying to make to the jury,
21 which I think you should be able to, is that they did a
22 thorough investigation. They produced a 2,000-page
23 report. And so if any impression is left with the jury
24 that TCEQ did nothing in response to the issue with
25 regard to dredging, that stipulation should take care of

1 it.

2 This now is going into how involved the
3 investigation was, whether or not they were being
4 helpful with it. And I do have that concern that the
5 defendant just raised that if I let these letters in,
6 then they have to respond, which means we're going to be
7 talking about the Superfund site.

8 MR. BENEDICT: Your Honor, if I can look
9 back on that. This is a letter we talked about last
10 week. Those redactions are the ones the Court suggested
11 be made in our discussions last week. All references to
12 "Superfund" are taken out. All it says is "Here's the
13 site. We're asking you what you know about it, and
14 here's the questions."

15 And then there's an exhibit -- and I
16 believe it's 154. I think Mr. Rodriguez confirmed to me
17 yesterday it is and he thought it is in. It is MIMC's
18 response to that, a 40-some-page document where they
19 answer the seven questions.

20 THE COURT: Okay, two things. If there's a
21 document that's already in evidence, there's a document
22 that's in evidence and you can talk about it. But, yes,
23 we did talk about potential redactions. But the problem
24 is, in thinking this all the way through in terms of the
25 effect, is by taking out the portion that's about the

1 Superfund process, it's misleading to the jury and under
2 what context the TCEQ is asking for the information.

3 And then if I let in their response, then
4 they have to respond by saying the other things they did
5 as part of that process, which led to the Superfund
6 site.

7 Let me look at the unredacted copy, but I
8 think where I'm coming down on this is that if they were
9 suggesting that your investigation was not quick enough
10 or appropriate or not comprehensive enough, that might
11 be an issue. But the stipulation, if it comes in as you
12 proposed, shows a pretty comprehensive investigation
13 with a 2,000-page report, which I think in and of itself
14 alleviates any concern about the suggestion in opening
15 that the TCEQ did nothing in response to dredging,
16 because that shows what your response was.

17 It may not have been to say "stop
18 dredging." You had a different response, which as we've
19 discussed, you thought would be more appropriate and
20 have a more permanent, long-lasting result; and I think
21 you ought to put that in front of the jury and be able
22 to.

23 MR. REASONER: Your Honor, if I might, just
24 getting back to what was originally really focused on.
25 Mr. Stanfield now has confirmation from his client that

1 the stipulation, as the Court described it, is
2 acceptable.

3 MR. STANFIELD: With the proviso that it's
4 introduced to them as "This is a stipulation about the
5 TCEQ."

6 THE COURT: So right now the way it reads,
7 so everybody can hear it, and then I'll give it back to
8 you, Mr. Benedict.

9 The Court would advise the jury, before
10 Mr. Benedict rests, that the parties have entered into a
11 stipulation about the TCEQ and it is as follows: "After
12 the TCEQ received the Texas Parks & Wildlife
13 Department's April 2005 letter regarding dredging, the
14 TCEQ continued sampling sediments as part of a Total
15 Maximum Daily Load Water Quality study of the Houston
16 Ship Channel system and participated with the United
17 States Environmental Protection Agency," EPA, in quotes,
18 "in investigating the site. The investigation efforts
19 are documented in a five-volume report of approximately
20 2,000 pages dated September 2006 and entitled 'Screening
21 Site Inspection Report' prepared by the TCEQ and
22 submitted to the EPA.

23 "In October 2008, the TCEQ requested that
24 the United States Army Corps of Engineers,
25 quote/unquote, Corps of Engineers, suspend the dredging

1 permit which had been extended by the Corps of Engineers
2 in December 2007."

3 I'm just taking out the extra "in." That
4 is very specific. It shows specifically what the TCEQ
5 did in response to the dredging letter. It details the
6 length and breadth of the investigation; and I think
7 unless the defendants are questioning the quality of the
8 investigation done by the TCEQ, which I've not heard
9 that they are going to do, I think this stipulation
10 should be sufficient and that the documents wouldn't be
11 necessary.

12 MR. BENEDICT: Your Honor, at some point in
13 time I do want to make an offer of proof, get specific
14 rulings on the documents.

15 THE COURT: You may.

16 MR. BENEDICT: If I may, we were talking
17 about what I believe is Exhibit 154. And again, I have
18 not been as into the weeds on all the exhibits. This is
19 not marked. This is the State's copy. That's the --

20 MS. HINTON: And it is not a pre-admitted
21 exhibit, Your Honor. It was on their list, but I'm
22 looking at it online. It is not pre-admitted. And this
23 takes us right down the road Ms. Ballesteros warned us
24 about. This is the first response.

25 MR. BENEDICT: I don't think the letter,

1 itself, refers to Superfund. The site wasn't listed
2 yet. We had seven questions to answer, and I think in
3 looking at the answers -- and I'm characterizing, I'm
4 interpreting whether that was raised. You can read it,
5 but they are denying any knowledge of even ever
6 operating the Site.

7 THE COURT: This is --

8 MS. BALLESTEROS: Your Honor, we're not
9 sure whether or not that actually is a pre-admitted
10 exhibit.

11 MS. HINTON: It is not a pre-admitted
12 exhibit. It is not pre-admitted, and it's taking us
13 right down the road we've all been concerned about.

14 THE COURT: I'm not sure what it's relevant
15 to that's still at issue in the case.

16 MR. BENEDICT: Okay. Again, I go back and
17 I don't want to belabor the point. I think there were
18 invitations to compare what defendants did and what TCEQ
19 did. TCEQ did an investigation, and they're still
20 providing information "We don't know anything."

21 MR. REASONER: And again, I'm going to ask
22 that when my opening is talked about, whole paragraphs
23 and whole sections are talked about. Things are taken
24 out of context.

25 THE COURT: Just to be clear, I have looked

1 at that portion of the opening statement many times. It
2 is clear to me in the way the entire part is worded that
3 it is talking about dredging. However, because the
4 TCEQ's response wasn't to say "stop dredging," that
5 didn't mean the TCEQ didn't have a response. And so
6 that's why we talked about the fact that the TCEQ ought
7 to be entitled to establish in front of the jury just
8 what they did in response to the dredging issue and that
9 was the purpose of the stipulation, which is very
10 detailed.

11 And so I don't see why -- how they
12 responded during their request for information is
13 relevant to any other issue, and it certainly gets into
14 the Superfund discussion, which they would necessarily
15 be required to get into to respond to the documents.
16 And no one has criticized the investigation, or will
17 criticize the investigation, that TCEQ did.

18 If they do, I will revisit that issue; but
19 my understanding is by entering into this stipulation,
20 they're agreeing they're not going to make any comment
21 about that.

22 MR. BENEDICT: And then I'm back to the
23 last thing, Your Honor; and I don't want to beat a dead
24 horse. Exhibit 8. Mr. Cedilote sent the e-mail, the
25 heartburn e-mail. This is about 14 months later and

1 Mr. Cedilote sent it again to them; and he's still being
2 told "We didn't even operate the Site. We have no
3 knowledge of even operating the Site."

4 MS. HINTON: And that is a pre-admitted
5 exhibit that was agreed to by the parties --

6 THE COURT: It is, but in all fairness to
7 Mr. Benedict, I don't think that I have read the
8 limiting instruction with Exhibit 8.

9 MR. BENEDICT: Yes.

10 THE COURT: And so I will sustain the
11 objection to the exhibit that Mr. Benedict is offering,
12 but I think I need to read the limiting instruction at
13 whatever time is appropriate that goes along with
14 Exhibit 8 because it was only being offered for the
15 purpose of showing Waste Management's state of mind as
16 to why they proceeded the way they did and not for the
17 truth of the matter asserted. So it's not putting
18 Mr. Cedilote in the position of taking a -- making a
19 legal conclusion. And so that limiting instruction does
20 need to be read to the jury, to be fair to the TCEQ.

21 MS. HINTON: And that letter, as you
22 recall, Your Honor, just said he had discovered that the
23 record titleholder was Virgil C. McGinnes, Trustee.
24 "Sorry for the heartburn."

25 THE COURT: That's all it said, but it was

1 being offered for the limited purpose and we haven't
2 read that limitation to the jury.

3 MS. HINTON: Thank you, Your Honor.

4 THE COURT: Okay. I will put these to the
5 side because I know you want to make an offer of proof.

6 With that, are we -- did I give you back
7 the stipulation?

8 MR. BENEDICT: You did.

9 THE COURT: Okay. So off the record for a
10 second.

11 (Whereupon, after a discussion off the
12 record, the following proceedings were had:)

13 THE COURT: We're back on the record.

14 MR. CARTER: Thank you, Your Honor. So
15 when we were wrapping up last evening, we were
16 discussing the very narrow issue of the charges being
17 made under the Spill Act against Champion, or
18 International Paper.

19 And as I mentioned when I first started,
20 we've moved for a directed verdict under the Spill Act
21 because we've been charged with violating that act in a
22 way to subject ourselves to punishment for a claimed
23 release beginning in 1985, 20 or so years after the
24 disposal took place and after the disposal ended.

25 My motion for summary judgment you have

1 previously ruled, as I mentioned yesterday, that under
2 the language of the statute, IP was not the operator or
3 the person in charge of the facility in 1985 at the time
4 of the alleged release. You've also ruled on summary
5 judgment that IP was not the landowner. Those issues
6 have been determined.

7 So IP believes that this ends any charge by
8 the government under the Spill Act because owner of the
9 facility means owner of the property or the
10 impoundments, themselves, not what's contained within
11 the impoundments. That reading is consistent with the
12 purpose of the Spill Act so that the person who is in
13 the best position to control the spill, owner, operator,
14 or person in charge of the facility at the time that the
15 spill occurs, is the person that should be responsible
16 for ensuring that that spill is addressed.

17 The Court, however, in an abundance of
18 caution, as I believe, has posited the question: Could
19 the owner, in the context of owner of the facility,
20 include the owner of the waste? So since you've asked
21 the question, and it was after our summary judgment, we
22 have developed conclusive evidence on the issue; that
23 is, if the owner of the facility includes owner of the
24 waste, Champion did not own the waste post-disposal.

25 This is simply a property law question.

1 Once personalty becomes affixed to the land, it becomes
2 the property of the landowner. MIMC and we agree on
3 this point. You heard yesterday the testimony of MIMC's
4 corporate representative that once the -- once the waste
5 was disposed of on the property of the landowner, it
6 became the realty of the landowner.

7 And that is the evidence to date. And
8 you've heard the evidence from the County's own
9 witnesses how the waste becomes part of the land. We
10 went through with Dr. Bedient and Dr. Pardue about how
11 the -- how the waste attached to trees and grass and all
12 of that issue.

13 So once it becomes part of the land under
14 property law, to separate it, now becomes a fixture. To
15 separate the fixture from the land, itself, there must
16 be some agreement with the landowner reflecting that
17 that fixture is, indeed, not part of the land. In other
18 words, Champion -- there must be some document that
19 reflects that Champion retained some reversionary
20 interest in the fixture that became part of the land.

21 The County has not come forward with one
22 scintilla of evidence of Champion retaining a
23 reversionary interest. In fact, the evidence is to the
24 contrary. The contract, itself, was to remove and
25 dispose of the waste from Champion's facility, and it

1 was disposed of into the property of the landowner.

2 The County cites to one document that it
3 says is evidence that the waste was Champion's. Of
4 course, that is not a legal document. That was in the
5 time of the operation; and as the Court has recognized
6 before in addressing that same argument, that says
7 nothing other than the fact that it was clear during
8 that period of time in 1965 that Champion's waste was
9 being removed and being deposited into the property of
10 the landowner. This is certainly not evidence to
11 overcome a directed verdict on this issue.

12 The County then turns and argues, "Well,
13 the waste is not an improvement." The case law is clear
14 on that point, and we pointed this out to the Court
15 yesterday. And even the cases cited by the County do
16 not support this proposition.

17 And regardless, at this point, that issue
18 is simply an issue of law. There is no evidence, there
19 is nothing to go forward to the jury for the
20 determination of whether or not the waste is still owned
21 by Champion, especially in 1985.

22 So at this stage of the case, our motion
23 for directed verdict should be granted on this issue.
24 The County has not brought forth any evidence that
25 Champion or IP owned the waste in 1985. As a matter of

1 law, we were not the owner of the facility at the time
2 of the claimed discharge for purposes of punishment
3 under the Spill Act.

4 THE COURT: Would you also address the
5 argument by, I believe it was Mr. George, about the fact
6 that IP fits within the definition of an operator
7 referencing CERCLA?

8 MR. CARTER: Right.

9 Jen, can you pull up that slide for us?

10 MR. STANFIELD: I think it's Slide 21.

11 No --

12 THE COURT: It's not 21.

13 MS. GRAY: 16 of Harris County's --

14 MR. STANFIELD: Oh, no, I'm looking for
15 ours. It's Slide 4.

16 So what they've cited to Your Honor goes
17 back to actually the *Best Foods* case, and we put it here
18 on the screen what the *Best Foods* case says an operator
19 has to be, "is someone who manages, directs, or conducts
20 operations specifically related to pollution; that is,
21 operations having to do with the leakage or disposal of
22 hazardous waste, or decisions about compliance with
23 environmental regulations."

24 Of course, there's a time element here, as
25 Mr. Carter noted, because when we look at the Spill Act,

1 it has to be the owner or operator in charge of a
2 facility at the time of the spill so that that person
3 can take a specific action. And what the County has
4 done is pointed you to the CERCLA definition. Of
5 course, these CERCLA definitions sometimes come in and
6 out of the case. But regardless here, it may have some
7 usefulness because we do not fit this definition of
8 operator.

9 And there is no evidence, whatsoever, that
10 we ever operated the facility at issue here. So that's
11 just not viable. But this is what the *Garrity v.*
12 *Miller* case referenced from the Fifth Circuit in 2000,
13 was this *Best Foods* definition.

14 MR. WOTRING: Briefly on the facts, and
15 I'll let David handle the law. The testimony and the
16 evidence about the ownership of the waste issue, again
17 setting aside the toggle switch or Tony's light switch
18 argument, I believe if you look at Mr. Slowiak's
19 testimony from one of the earlier days in this case, the
20 corporate representative, where he talks about it being
21 Champion's waste, that's in response to a quotation from
22 the findings of fact that were submitted to the jury,
23 not as a findings of fact, but as do you agree or
24 disagree with this statement. He characterized it as
25 Champion's waste at that time.

1 The second piece of evidence about which --
2 which is a current -- and the corporate representative's
3 position currently in this litigation -- his deposition
4 I think was taken in 2014.

5 THE COURT: Your point is, he didn't say
6 "We generated the waste, but we don't own it anymore"?

7 MR. WOTRING: That's exactly so. So if we
8 back up and go to the beginning of this from December of
9 1965, we have the Private Champion Memorandum, as we've
10 been calling it; and I'll find the exhibit number soon.
11 And in that they also call it Champion's waste, or to be
12 more specific, Champion's, apostrophe (s), waste at that
13 time. So you go from 1965 to 2014 with Champion and
14 International Paper recognizing that this is their waste
15 and they have an ownership interest, certainly getting
16 you beyond the scintilla of evidence for that particular
17 issue on the ownership of the waste.

18 Then once you get into the ownership of the
19 waste, it takes you down the path of the ability to
20 control. Our review of the law, and I may be stepping
21 out of bounds, is the *Garrity v. Miller* case. Our
22 understanding is if you're an operator, you have the
23 authority to control the cause of the contamination at
24 the time the hazardous substances were released into the
25 environment. So that's our understanding of *Garrity v.*

1 *Miller.*

2 And we have up on the screen -- if I can
3 have the exhibit number from the Private Champion
4 Memorandum. Exhibit No. 16, as redacted in the very
5 first paragraph -- if I can have that first paragraph
6 blown up --

7 THE COURT: And then you reference the last
8 sentence.

9 MR. WOTRING: And the last sentence in that
10 document, again, Exhibit Number 16, as redacted --

11 If you could pull that up, Brian. Next
12 page.

13 I'm sure -- this is a quote from Exhibit
14 No. 16, as redacted. The last paragraph, it says,
15 quote, "I am sure we all realize the sensitive nature of
16 this entire operation and the need for special
17 precaution in connection with the disposal of this waste
18 material," end quote.

19 So if you put the first and the last
20 paragraph together and the paragraphs in between, that
21 is evidence that Champion understood this to be their
22 waste, their operation, and certainly their problem.
23 And that is consistent with the -- the way that it's
24 treated in the -- the April/May Texas State Department
25 of Health investigation where you have a Champion

1 representative out there at the Site, discussing the
2 Site as if they are involved in the operation, which,
3 indeed, they are.

4 And certainly at the time if you believe
5 Champion's view of what they were doing, they were
6 putting in waste watery sludge into the Site, this
7 litigation is about, and shipping water back. So this
8 was part of their operation in handling their waste
9 operation materials.

10 So for all those reasons, we think they
11 certainly qualify as an owner, at least there's a
12 scintilla of evidence about their ownership -- more than
13 a scintilla of evidence about their ownership. They
14 qualify as an operator. Therefore, they qualify for
15 liability under the Texas Spill Act.

16 I don't know that we need to respond
17 further on the argument about fixtures or not fixtures
18 applying --

19 THE COURT: I do want to ask one question
20 about that. Can you imagine a situation where something
21 would be considered a fixture that's not something that
22 adds value? In other words, there may be something
23 that's affixed to the land that's an eyesore or that's
24 just -- the person who put it there and affixed it to
25 the land liked it, but when you try to sell the

1 property, it's not something that adds value, it
2 detracts from the -- from the value of the property --

3 MR. GEORGE: Well, Your Honor --

4 THE COURT: -- that can't be --

5 MR. GEORGE: -- the improvement would be --
6 it's a betterment and it adds to the value. And the
7 case we cited from the First Court --

8 THE COURT: You believe it absolutely has
9 to add value to the overall property?

10 MR. GEORGE: To be an improvement -- I
11 mean, the reason we used the common law -- used the word
12 "improvement" was from that concept, which is built into
13 it, and the courts have held -- Texas courts have held
14 that -- defined improvement as adding to the value, and
15 a fixture must be an improvement.

16 Now, there can be cases where it doesn't
17 necessarily in the end -- for example, in the cases we
18 cited, one of them --

19 THE COURT: Your point is it may be
20 intended to add value, but then it has something wrong
21 with it.

22 MR. GEORGE: Well, like the asbestos pipe.
23 In 1950, when you built a building and put asbestos pipe
24 in, you added value to that building; and the key is at
25 that time, the intent and what happened at that time.

1 In retrospect, in 2000, there was some negative to it;
2 but at the time there was adding value.

3 And if I could get the --

4 THE COURT: And is your point also that no
5 one could say that the intent at the time of this
6 disposal was to add value to the property?

7 MR. GEORGE: I don't say that, Your
8 Honor -- yes, I say that, but I say that with evidence
9 because we have in the board minutes in 1968 in realtime
10 the property was worth 50,000 and now that it has been
11 put to its intended use and has been, you know,
12 improved, it's been improved to the tune of being valued
13 less.

14 If we could go to Page 8. So we know then
15 that when they put this stuff in, it made the property
16 go from 50,000, which is half a million today, a lot of
17 money, to being a nominal value of 1 dollar. So it was
18 intended to and did destroy the value.

19 And we look at this. The idea is should
20 this be the property of the landowner, and I think the
21 idea is if you're going to put stuff in that improves
22 it, that goes to the landowner; but if you're going to
23 put something in that would totally destroy it, make it
24 worse, we're not going to accept any agreement and
25 impute that onto the -- to become the property of the

1 realty.

2 I think it's also clear that the idea was
3 that this was supposedly clear that Virgil McGinnes
4 owned this land and that everybody agreed that this was
5 going to go and be put there and be Virgil McGinnes'
6 land. Well, there's not one document where Virgil
7 McGinnes ever agreed that this would become part of his
8 land. These agreements are not with Virgil McGinnes.

9 So I think that falls apart that these --
10 that if it's supposedly his land, that these third
11 parties can come and agree to that. And also, I thought
12 it was telling -- Mr. Muir asked -- the tape they played
13 at the very end when MIMC's courtroom rep, Mr. Golemon,
14 was asked, "Who does this waste belong to at the end?"
15 He said, "The realty owner."

16 MR. CARTER: Mr. Muir asked that question.

17 MR. GEORGE: That's right. Mr. Muir asked,
18 and then they played it. And then the next question is,
19 "Well, how might that happen?" He says, "I have no
20 idea. No idea." So, yeah, they can throw that out as a
21 naked assertion, but they had no theory, MIMC had.

22 And so just in conclusion, the fixture,
23 this is a --

24 MR. WOTRING: Let me handle it.

25 There is a fact issue on the fixture on the

1 fact that being affixed to the land, which I think we
2 touched upon yesterday, and that some of it does --
3 well, I don't think that there is a legally established,
4 for the purposes of a directed verdict, claim that they
5 can make that the paper mill sludge was affixed to the
6 land. The testimony is that it was in earthen pits,
7 that some of it -- some of which would adhere to the
8 sides, but that a lot of it is gone and has washed away
9 with the tides and the water of the San Jacinto River.

10 So I don't think for the purposes of
11 directed verdict they have established conclusively that
12 this is a fixture that it is affixed to the land as
13 opposed to something being placed on top of the land.
14 Then you can reference Mr. George's statement yesterday
15 about the intent at the time was that it not be affixed,
16 that it be placed in between the land and -- and the
17 earthen pits with a clay like --

18 MR. CARTER: Judge, we're sort of turning
19 this on its head. I think the plaintiffs have the
20 burden of proof here. They've come forward with no
21 evidence on any reversionary interest back to -- back to
22 Champion for the waste that was deposited into the --
23 into the disposal area.

24 And when we talk about fixture, and I turn
25 to the Court's attention Slide 17 of our presentation,

1 there's no issue about increase in value, that that's a
2 requirement to establish a permanent annexation to the
3 property. The key factor, and we point to you the
4 *Hernandez vs. Renker* case, 14th District Court, 2009,
5 recognizing that permanence is the overriding element of
6 consideration. And that is the issue that is -- did
7 this become a permanent part of the land, that's the
8 key.

9 They talk about ownership, or the issue of
10 operator in the *Garrity v. Miller* case. And the quote
11 that they say in their presentation is "an entity that
12 is an operator if it had the authority to control the
13 cause of the contamination at the time the hazardous
14 substances were released into the environment."

15 And remember, under the Spill Act we're
16 talking about 1985. There is no evidence that we had
17 the authority to control the -- a -- a release in 1985
18 that's been presented by the County under any theory
19 that's viable here in this case, Your Honor.

20 THE COURT: Let me let you respond to that,
21 Mr. George.

22 MR. GEORGE: On the statute of limitations
23 -- on the burden of proof, we have -- we met our burden
24 of proof when we showed this is Champion's waste at the
25 beginning; and once it's your property, it continues as

1 your property, unless you can show how it ceased to be.
2 So they now have the burden to show that it changed. So
3 we've shown it's Champion. They need to show it's not.

4 And then on to the issue of the fixture and
5 the issues of permanence, we don't dispute that when you
6 go over the elements of is this type of improvement a
7 fixture, permanence, intent, those aren't elements; but
8 those are the secondary point. We begin with, and this
9 is their own briefing says it, black letter law, a
10 fixture is a type of improvement.

11 And so if we want to know if this
12 improvement meets the category of fixture, we go through
13 a checklist; but we begin with is it an improvement.
14 And as we've said, improvement requires a betterment.
15 99.9 percent of cases do not discuss that. They have no
16 need to discuss that because most people don't put stuff
17 that harms their property; but the cases we cite, the
18 First Court of Appeals case, describes it as improving,
19 as well as that being the common law throughout the
20 country, as in our last brief we gave you examples
21 throughout. That is just common law. That is
22 historically why it's called an improvement.

23 MR. CARTER: The final issue on this,
24 Judge, is that I'm afraid the County has got it wrong,
25 is that once the property goes into the -- into the

1 disposal area, it is a fact; and once it becomes
2 attached, it is a fixture. It becomes the landowner's
3 property, unless there is some document that shows that
4 there is a reversionary interest from the landowner back
5 to, in this case, Champion.

6 They have the burden of proof on that
7 issue. They have come forward with no evidence to show
8 that this property, this waste, reverted back to
9 Champion. That's their burden of proof. We have seen
10 nothing of it. There is nothing of it.

11 MR. GEORGE: Reversing -- that's talk of
12 realty. This is personalty. This remains personalty.
13 It did not convert to realty. So speaking of
14 reversionary is wrong.

15 Your Honor is going to see a video,
16 perhaps, of Mr. Zoch -- or Dr. Zoch --

17 MR. STANFIELD: I don't know what you're
18 talking about.

19 MR. GEORGE: The slide you showed
20 yesterday. The ship coming in --

21 MR. CARTER: This is not evidence in the
22 case. At this point in time --

23 MR. GEORGE: Your Honor -- please, sir, let
24 me finish.

25 THE COURT: I think what Mr. Carter is

1 raising is at the directed verdict stage, you can't
2 reference evidence that's not in.

3 MR. GEORGE: Let me tell you this: There
4 is no question that they act as if this was buried.
5 This was not buried. They built up berms, they built up
6 walls, and they put personal property in it. And as
7 it's poured in, some of it dries, poured in. That is a
8 placement of personal property. That's not burying it.
9 That's not incorporating it. You place your personal
10 property on someone's land. That's not a fixture.

11 MR. CARTER: Under the terms of art, Your
12 Honor, personalty -- it was personalty on the barge.
13 Once it went into the disposal site, it became affixed
14 to the property. There's no dispute about that.
15 There's no evidence disputing that.

16 Once it becomes affixed to the property, it
17 becomes real property. The issue then becomes an issue
18 of real property law; and at that point in time, for
19 there to be any interest of Champion, there has to be a
20 reversionary interest back to the landowner. And we
21 have seen no evidence.

22 THE COURT: I think I understand
23 everybody's position on this. Let's move on to the next
24 motion for directed verdict.

25 MR. STANFIELD: All right, Your Honor. And

1 just to reiterate one thing on the Spill Act, which I
2 think you understand; but just to be clear, and as we
3 put on the slide up on the screen, the Spill Act is
4 about current owners and operators at the time of the
5 discharge, not former owners and operators, and that's
6 incredibly key.

7 And we would encourage you to actually look
8 at the case law, and that will be cited in our briefing
9 on ownership. In particular, the Supreme Court of Texas
10 cases that lay out what the standard is and that the
11 term "improvement" is a term of art in the law that goes
12 far back and is much like the term "suffer." Today we
13 might use it differently than it was used by the court
14 of Exchequer in the 1800's. So it's -- we can't draw a
15 false dictionary distinction today based upon how terms
16 have been used long over time.

17 All right, Your Honor. The next motion for
18 directed verdict that we have goes to the issue that
19 there is no evidence of a daily discharge.

20 Jen, can you skip forward to Slide 23?

21 Your Honor, to recover daily penalties,
22 Harris County has to show a daily violation. That's
23 according to the code. That's according to the case
24 law. Here there is no evidence of a daily release
25 through the site as a whole, much less in part; and

1 Drs. Pardue and Bedient are insufficient to prove that
2 point.

3 Dr. Pardue discusses three release
4 mechanisms: tidal action, levee breach, and
5 submergence. These all do appear to be somewhat
6 combined with one another; but, Your Honor, let me start
7 with tidal action.

8 There is no evidence of tidal action,
9 certainly not prior to July 1st, 1989. And what we put
10 on the screen is his actual trial testimony from
11 October 21st where he noted that it was impossible for
12 him to determine whether or not tidal action caused any
13 release at any point in time on any specific day.

14 And, in fact, the questions and answers
15 went like this:

16 "QUESTION: Was there tidal action that
17 resulted in waste material being released from the pits
18 on that day?"

19 And we're talking here about the
20 Bicentennial, July 4th, 1976.

21 "ANSWER: That is impossible to know.

22 "QUESTION: You don't know, do you?

23 "ANSWER: It is impossible to know.

24 "QUESTION: Do you know whether there was
25 waste material released from the pits on July 4th, 1976?

1 "ANSWER: No."

2 And notably, that question was not limited
3 to tidal action. That was from any mechanism,
4 whatsoever. And then, of course, the questioning went
5 from there and he admitted, "No, I can't tell you on any
6 particular day whatsoever."

7 In addition, Your Honor, from 1973 through
8 July 1st, 1989, all Dr. Bedient can rely on really, and
9 Pardue by relying on Bedient, is tidal action, unless he
10 has an aerial photograph showing a breach in the levee
11 and water exchange. He cannot rely on flood events, and
12 he cannot rely on tidal action -- tidal action because
13 your instruction says you can't rely on it prior to
14 July 1st, 1989, and flood events can't be relied on
15 because the Highway 90 gauge data is out for all
16 purposes in this case now pursuant to the instruction
17 from the Court.

18 Consequently, from 1973 through July 1st,
19 1989, there is absolutely no evidence, whatsoever, of
20 waste material getting out because there is not
21 sufficient evidence of any particular day, one, that
22 there was exchange of water; and, two, that that
23 exchange was sufficient to cause a release.

24 Your Honor, once we get to alleged
25 submergence into the water, I just need to point out

1 that even that testimony is not going to be adequate,
2 even after 1989, because as Dr. Bedient testified, that
3 still relates to his tidal theory about the tide coming
4 in and the tide going out. And we put on the screen
5 testimony from October 23rd here where Dr. Bedient was
6 asked, again, just in general, about tidal action:

7 "QUESTION: So for that date, you cannot
8 tell us whether there was a release of waste material
9 into the river on that date, right?

10 "ANSWER: In which year?

11 "QUESTION: May, 1977.

12 "ANSWER: Well, what I do know is that by
13 that point in time, a breach was certainly present in
14 the levee and out in the river, and all the photographs
15 and all of the evidence that I have seen shows that
16 there was a connection starting in '73, certainly shown
17 in '76. And so" -- and this is clear -- "the
18 opportunity certainly is there for there to be exchange
19 on that day.

20 "QUESTION: The opportunity?

21 "ANSWER: Yes. Now, do I know the exact
22 elevation of water and all of that on particular day?
23 I -- I don't know.

24 "QUESTION: And you would need that
25 information in order to offer an opinion whether on that

1 particular day there was a release, right?

2 "ANSWER: On that particular day."

3 Your Honor, this goes forward actually past
4 '89, as well, because what you will remember from the
5 evidence and from the testimony is that, in fact, all we
6 ever get are opportunities for discharge. That's all we
7 ever get. We don't get testimony that, in fact, there
8 was on any given day. So we've shown more testimony:

9 "QUESTION: Dr. Bedient, let me just ask
10 you if you remember a deposition and being asked these
11 questions and giving these answers."

12 And then he goes through it again and
13 confirms, yes, we're only talking about opportunity.

14 In fact, it was clarified with him:

15 "QUESTION: And you'd agree with me that
16 there is a difference between conditions creating the
17 potential for dioxin to be released and documenting it
18 and showing an actual release on a given day?

19 "ANSWER: Oh, I agree with that.

20 "QUESTION: Just to be clear, you can't say
21 that there was a release from all three pits on any
22 given day, correct?" Any given day, any time period.

23 "ANSWER: That's a correct statement."

24 That's the state of the evidence, Your
25 Honor. There is no evidence of a daily release in this

1 case. The same thing is true with Dr. Pardue, and we
2 can go through Dr. Bedient's testimony about this.

3 Let's go to flooding real quick. I just
4 want to clarify on flooding and here is why they don't
5 have evidence of flooding, because he did no -- he
6 testified about this on October 23rd at Page 54, Lines 1
7 through 12, that he did no analysis to determine the
8 number of days where there was flooding.

9 And he further admitted -- significantly
10 after 1989, Your Honor, Dr. Bedient admitted to the
11 extent we're in three versus one, as we should not be.
12 To the extent we are, he admitted that the western
13 section of the impoundments was not inundated every day
14 after 1989.

15 And so we have Bedient admitting that he
16 can't say there was a release from all three pits on any
17 given day. He did not offer opinions about releases
18 from the particular impoundments or pits. Again, he
19 considered them as one site. And, consequently, there
20 is no evidence that he can support of discreet releases
21 from any pits on any day, much less every day.

22 So here we've walked through what we count
23 as really maybe four to the extent flooding and tidal
24 action and submergence and breach are all separate.
25 This is how your instruction plays into this case before

1 July 1, 1989: Tidal action can't support it.
2 Submergence doesn't occur prior to July 1, 1989,
3 pursuant to the testimony. The breach is not enough
4 unless you can show specific water exchange with either
5 flooding or tidal. You can't get there without the
6 Highway 90 gauge. And he offered only six flooding
7 events, but he cannot tie a flooding event to a specific
8 level in the river to get through any breach because,
9 again, he doesn't know how deep that breach might have
10 been, how far it was up above the river, etcetera.

11 So I will leave that there, Your Honor,
12 because Pardue relies on Bedient, because Bedient falls
13 out -- their evidence of daily release falls out, as
14 well. At most they've got the possibility of a release,
15 no documented evidence of any particular release.

16 MR. REASONER: And, Your Honor, if I might,
17 Waste Management of Texas joins this motion. I think if
18 the Court would think about it, all of us would agree if
19 we were talking about three days, four days, five days,
20 we would be in a trial and we would be scrutinizing,
21 "Okay. What happened on this day? What is the evidence
22 of a release?" You know, we would be scrutinizing all
23 of the particular finite number of days they were
24 talking about.

25 At what point do we say, "Okay. Gosh,

1 there's so many days here, we're just going to relax the
2 standard" because that's, in effect, what they're
3 arguing here, Your Honor. They're saying "We have sued
4 you for such an incredibly long period of time that it
5 would be impossible for us to show a release on each of
6 those particular days, so we are going to say that the
7 opportunity for release is enough."

8 That turns the law on its head. They are
9 here with a burden to show a release on each of these
10 days; and the fact that they have gone back in time some
11 ridiculous time period does not reduce, minimize, or
12 eliminate their burden. They can't show it, and an
13 opportunity for release is not enough.

14 Thank you, Your Honor.

15 MS. HINTON: Your Honor, MIMC also joins in
16 that motion for instructed verdict on the release issue
17 and incorporates the arguments of counsel for
18 International Paper and Waste Management of Texas.

19 THE COURT: Thank you.

20 MR. WOTRING: Turn to Slide No. 19.

21 Let's walk through the evidence that we
22 think is presented in the record as the case stands that
23 is much more than a scintilla of evidence and requires a
24 denial of defendants' motions for directed verdict.

25 Starting with the next slide, No. 20, this

1 is an excerpt from the transcript on October 22nd at
2 Page 34. It is International Paper's corporate
3 representative, Philip Slowiak. The question is:
4 "International Paper understands that the 2,3,7,8-TCDD
5 at issue at this site came from the Pasadena Champion
6 Mill, isn't that correct?"

7 His answer was an unequivocal "Yes."

8 Moving on, Dr. Pardue in the discussion,
9 this is a reminder about the record discussion about the
10 concentrations of dioxin immediately above the
11 impoundments that we had with Dr. Pardue, based upon a
12 couple of the graph readings from the RI/FS study.

13 So the first record excerpt would be
14 Dr. Pardue on October 17th, 2014 on Page 154, where
15 Dr. Pardue testified:

16 "So the concentrations immediately above
17 the impoundments is a hundred times higher than they
18 were elsewhere in the river."

19 And his second excerpt is, he stated "They
20 found very elevated concentrations of dioxin still in
21 contact with the water that was within the waste," and
22 he's talking about when they did the study. This is
23 also for his opinions that if water is in contact with
24 the surface of the impoundments, then dioxin is being
25 released.

1 The second transcript cite is to the
2 October 17th transcript at Page 162. Moving on about
3 the specific testimony and evidence, again as background
4 and foundation for the expert's opinions in this, there
5 was substantial testimony about the erosion of the berms
6 surrounding the impoundments starting with Page 126 of
7 the record where -- Slide 23. Dr. Pardue's testimony
8 that, "Whenever the river water would hit it," talking
9 about the berms, back to the quote, "you know, they come
10 in contact with rainwater, for example, you would get
11 this erosion process."

12 Further evidence was in talking about the
13 breach in the berms starting with the aerial photographs
14 on February 14th, 1973 on Page 158 of the October 21st
15 transcript where Dr. Pardue testifies: "Okay. And did
16 you see any records or documents indicating that there
17 was any maintenance or inspection of the impoundments
18 from February 15th, 1973 through March 30th of 2008?"

19 The answer was: "I did not, end quotes.

20 I think at this stage of the record that's
21 probably undisputed and will remain undisputed that from
22 February 15th of 1973 through March 30th of 2008, which
23 is now the penalty period, there was no ongoing
24 maintenance of the berms; and, therefore, the breach
25 that you see on February 15th, 1973 would have continued

1 throughout that period of time.

2 It was, as the next slide states -- or as
3 Dr. Bedient stated on October 23rd, 2014 on Page 33 of
4 the transcript, that that was not a condition that, as
5 he put it, quote, "I don't believe it's going to heal
6 itself," end quotes.

7 Now go to Slide 25. Further testimony from
8 Dr. Bedient on October 23rd of the transcript at Page
9 32:

10 "You saw the breach in the impoundments on
11 this figure from 1973, correct?"

12 His answer was: "Yes."

13 The next question: "And are you aware of
14 any information that there was maintenance of these
15 levees and berms from 1973 on through the end of the
16 penalty period in 2008?"

17 "I have seen no evidence in anything that I
18 have looked at in any of the documentation."

19 So moving on to Slide No. 27, Dr. Pardue's
20 testimony in the transcript on Page 129 where he states,
21 quote, "Unless they were maintained, unless they were
22 repaired on a regular basis, material would have eroded
23 away and, therefore, we saw what we saw. The water was
24 able to get into the impoundments and they weren't taken
25 care of."

1 Further foundational support for the
2 expert's opinions is contained on Plaintiffs' Exhibit
3 No. 861, which I think is the Texas State Department of
4 Health report. In it it says that, "According to
5 'officials of Champion,'" and I'm on Slide 28, "the
6 'dried material resembled a cheaper grade of cardboard,
7 such as used in egg cartons." And Dr. Pardue's
8 testimony on this subject, the transcript on
9 October 17th at Page 111 is: "My experience with wet
10 cardboard suggests that, you know, once it gets wet, it
11 becomes more vulnerable to breaking apart or to --
12 certainly to not keeping the integrity of a layer."

13 This issue has -- the particular issue
14 involved in this case -- one of the particular issues in
15 this case that has been addressed by a state court, an
16 appellant court, is the *State v. Malone Services Co.*,
17 853 S.W.2d 82, where it states, "The jury could
18 reasonably infer continual seepage in lieu of credible
19 evidence of a force or event that would have stopped the
20 seepage."

21 What we have is the existence of a breach
22 in the berm as of February 15th, 1973. The -- I think
23 undisputed and will remain undisputed fact that there
24 was no maintenance or repair of that breach of the berm
25 allowing continual water to be in contact with the

1 surface of that impoundment releasing discharge each and
2 every day thereafter during the -- what we've called the
3 second time period from February 15th, 1973 on through
4 June 30th of 1989.

5 Dr. Pardue testified about the existence of
6 the breach in the berm on October 17th. The transcript
7 at Page 107 where he stated, quote, "The aerial
8 photograph is the first aerial photograph that we start
9 to see a break in the levee," Dr. Bedient also testified
10 about this, that the aerial -- "1973 aerial photograph
11 clearly shows for the first time a breach in the berm or
12 in the levee on the eastern side of the impoundments."

13 Dr. Pardue testified further on Page 159 of
14 the October -- October 22nd -- Dr. Pardue further
15 testified on Page 159, I think of the October 22nd
16 transcript, that "I believe that, based on my detailed
17 assessment and my analysis of aerial photographs into
18 the future from '73 onward all the way into the 2000's,
19 the breach was there and it stayed there and it enlarged
20 through time. And submerged, it appeared to be larger;
21 and it was always there in every single photograph,
22 every single one that I looked at from 1973 forward."

23 With regard to the particular mechanisms of
24 release, Dr. Pardue discussed that on October 17th in
25 the transcript at Page 153, he identified the release

1 mechanisms for dioxin of the sludge as being particles
2 dissolved into the water column, itself, and the
3 colloids transport of dioxin.

4 Then on October 17th of the transcript at
5 Page 153, Dr. Pardue testified, and this is a quote, "Do
6 you believe those mechanisms were at large every day
7 from the period of that photograph in 1973 through
8 March 30th of 2008?"

9 "ANSWER: As long as there was water in
10 contact with the surface of the waste, those mechanisms
11 are happening."

12 He was also asked on Page 148 of the
13 October 21st transcript: "Dr. Pardue, do you have an
14 opinion, based upon reasonable scientific certainty, on
15 whether there were daily releases from the impoundment
16 from February 15th, 1973 through March 30th of 2008?"

17 His answer was: "I do."

18 The next question is: "What is that
19 opinion, sir?"

20 The answer was, quote, "That there were
21 daily releases from the impoundments during that time
22 period."

23 Slide 35 is Dr. Bedient's testimony on this
24 very issue contained in the transcript on October 23rd
25 at Page 87, Line 22 through 88, Line 16. He also

1 confirms that, based upon reasonable scientific
2 certainty, that there was a release every day or, as
3 I'll put in the record, "Okay," the first question --
4 "To some, based upon the information you have reviewed
5 in this matter, the aerial photographs and the survey
6 and the other information, do you have an opinion, based
7 upon reasonable scientific certainty, about whether
8 there was water in communication with the pits every day
9 from February 15th, 1973 through March 30th of 2008?"

10 His answer was: "I do have an opinion."

11 The next question is: "And what is that
12 opinion?"

13 And his answer was: "My opinion still
14 stands, as it always has been, that the evidence, the
15 aerial photos, proximity to the river, all the things
16 I've reviewed, all the documents. My finding is that
17 within reasonable scientific probability, there was
18 transport each and every day."

19 The next question: "Okay. And you heard
20 Dr. Pardue's opinion about if there was water in
21 connection with the surface of the impoundments, there
22 would be dioxin being released every day?"

23 His answer was: "Yes."

24 We can go on to daily releases from what we
25 call the third period, and again for purposes of the

1 record and the motion to dismiss stage of the trial, we
2 talked about the first period being from September 1st,
3 1967 through February 14th of 1973. Previous rulings of
4 the Court had excluded testimony regarding that initial
5 period. The second period that we've talked about is
6 from February 15th, 1973 on through June 30th of 1989.

7 And the third period, the one period we're
8 talking about now, is what we'll refer to as the third
9 period for ease of reference is July 1st, 1989 through
10 the end of the penalty period on March 30th of 2008.

11 During that period of time we had
12 plaintiffs' survey, which is Plaintiffs' Exhibit
13 No. 1005, which is in evidence showing that at least
14 parts of all three of the pits are inundated by
15 July 1st, 1989. That is Slide 37. A picture of that is
16 contained on Slide 38, which we've reviewed in the
17 trial.

18 Dr. Bedient testified about that particular
19 issue on October 23rd of the transcript at Page 86,
20 Lines 7 through 19. I don't think I need to read those
21 into the record. Briefly, his opinion was that portions
22 of all three of the pits were inundated, including a
23 portion of the western impoundment. The two eastern
24 impoundments, he testified, were underwater and that
25 there was a portion of the western impoundment that was

1 submerged underwater at the same time, resulting in
2 three separate releases each and every day after that
3 day.

4 Or to sum it up, on Page -- Slide 40,
5 Dr. Pardue testified on October 17th of 2014, the
6 transcript at Page 105 is "My opinion is that most of
7 the pit area, certainly pits 2 and 3, were completely
8 submerged by July 1st, 1989."

9 Further evidence of releases from the third
10 period of time, July 1st, 1989 through March 30th of
11 2008, "Every aerial photograph between July 1st, 1989
12 and March 30th, 2008 shows pits 2 and 3 underwater."
13 That's from the transcript on October 17th, Page 105.

14 Dr. Bedient testified on October 22nd of
15 the transcript on Page 163, "The aerial photographs
16 clearly show significant submergence and inundation post
17 1989." He testified also that "much of eastern" -- I'm
18 looking at Slide 42 -- "much of the eastern side by
19 1989, the Summer of '89, is completely and totally
20 submerged at a condition of mean high tide" and that as
21 a result, Slide 43, looking at Dr. Bedient's testimony
22 for the transcript at -- on October 22nd at Page 161,
23 "Once the pits are inundated, there is daily release of
24 dioxin."

25 And the quote from Dr. Bedient: "For every

1 day thereafter going forward in time, there is no
2 question in my mind that there were releases of dioxin
3 coming out of these pits. They're in direct connection
4 now, inundation from the river on a daily basis."

5 Dr. Pardue also testified on the
6 transcript, Page 153 on October 17th:

7 "QUESTION: Do you believe those mechanisms
8 were at large every day from the period of that
9 photograph in 1973 through March 30th of 2008?

10 "ANSWER: As long as there was water in
11 contact with the surface of the waste, those mechanisms
12 are happening."

13 Further testimony about the daily releases
14 during a third period of time, July 1st, 1989 through
15 March 30th, 2008 is contained on the transcript as put
16 up on Slide 45. October 21st, the transcript, Page 148,
17 Lines 10 through 17, Dr. Pardue testifying about daily
18 releases from the impoundment.

19 That concludes our presentation on the
20 daily releases during the second and third time periods.
21 The issues raised by counsel for the defendants
22 addressed a couple of issues. One, that there are just
23 too many days here and we need to go back and scrutinize
24 every day. The requirement is for Harris County to come
25 forward with evidence sufficient to meet the --

1 sufficient to meet a scintilla of the evidence. We
2 believe we have done that in connection with showing a
3 daily release from period 2 and period 3 and certainly
4 by the time we send this case to the jury, we will have
5 submitted more than a preponderance of the evidence on
6 the particular issue, justifying a verdict for Harris
7 County for a daily release from February 15th, 1973
8 through March 30th of 2008.

9 To the extent there's questions about how
10 we can know for certainty, that's not required in the
11 law. Our experts testified, based upon reasonable
12 scientific probability, about daily releases and that's
13 all that is sufficient and certainly more than justified
14 in getting past the directed verdict stage of this
15 trial.

16 THE COURT: Thank you.

17 MR. STANFIELD: Your Honor, let me address
18 how I think it's best to kind of piggyback off of what
19 the County just said. First, I do think we should break
20 these into the two time periods, February 15th, '73
21 through July 1, '89.

22 Second, I think we can take the different
23 mechanisms as they've been laid out. There's dissolving
24 or partitioning in the water. There's particles getting
25 in the water, which I understand to be the material

1 eroding into the water; and there's colloidal transport.
2 And then finally, I'm not going to hit cause, suffer and
3 allow fully because that's the next directed verdict
4 that will address that.

5 Let me start with the *Malone* case briefly.
6 The *Malone* case, if memory is serving, was an
7 underground storage tank case where there had been a
8 documented -- I'm sorry -- "Where there had been a
9 documented release and then after that seepage, which is
10 not in this case, but still after seepage had been
11 documented, then it went forward in that case and said,
12 "Okay. Well, there's nothing to say that it stopped."

13 The other case that the State has cited is
14 the *City of Greenville* case, which relates to a
15 landfill, where there was an affirmative duty to put
16 2 feet of soil cover on and over time it was documented,
17 "We're just never seeing that soil cover put on." That
18 is a different case from here, where rather than --
19 there's no regulation that we omitted to follow such as
20 putting soil cover on. The allegation here is that we
21 affirmatively cause, suffer and allow or permitted a
22 release or discharge on a particular day. So the
23 *Greenville* case doesn't help.

24 The best case they have is *Malone*, but that
25 is a different factual scenario and introduces -- really

1 the problem here to using that kind of thinking with
2 this case, because we never have a documented start date
3 for release in this case, where there's an actual
4 documented release.

5 The most we get from Drs. Pardue and
6 Bedient is that in their mind, the conditions exist to
7 make it possible for a release to occur, but we don't
8 have a documented release ever occurring to start that
9 *Malone* clock, which is why what Mr. Reasoner said is
10 absolutely correct; and I know Ms. Hinton would have
11 said it as well, had it not already been said, which is
12 you cannot reduce the County burden of proof here at
13 all. They have to have a documented release date on a
14 mechanism that would continue to occur, absent some
15 other thing happening.

16 So this is not the *Malone* case. The County
17 has no evidence of releases, whatsoever, from the cite
18 that the defendants here caused, suffered, allowed or
19 permitted. Let me start with the quote from Mr. Slowiak
20 where he was asked -- and it was a question from the
21 UAO, but he was asked whether we agreed that the TCDD at
22 the Site came from the mill.

23 He said, "Yes. The 2,3,7,8-TCDD located at
24 the Site, still contained at the Site within the waste
25 material, is from the mill." That's not controversial

1 and it's not evidence of anything.

2 Furthermore, when Dr. Pardue started to
3 testify, "Well, when you take a filter sample from above
4 the Site, I see elevated levels of dioxin." He did not
5 do a fingerprinting analysis to tie it to the specific
6 waste. And as we know in this case, in fact, looking at
7 the Charge that he used in front of the jury, was there
8 was dioxin both north and south of this site and there
9 are many sources of dioxin, but they're not
10 fingerprinted to the site. That is not a scintilla of
11 evidence to say that these defendants caused, suffered,
12 allowed or permitted any discharge of dioxin from the
13 site simply because you get a spiked reading there.

14 You would have to fingerprint it to the
15 site, and then you would have to tie that to something
16 that the defendants caused, suffered, permitted or
17 allowed.

18 And that -- by the way, that does relate to
19 the dredging evidence that has come forward in this case
20 so far, which is that dredging is something that the
21 defendants did not do and is something that would cause
22 a release.

23 Your Honor, in the taking on the sample
24 that Dr. Pardue talked about, that, of course, was a
25 sample taken within the waste, itself, within the waste.

1 It was an unfiltered sample when a piezometer was
2 slammed into it, hammered into the waste, showing you
3 how strong it is, and then they take a sample out and
4 say, "Well, we have an elevated reading of dioxin that
5 triggers in this waste." That's no evidence of it being
6 discharged or released at all. So they don't have
7 evidence there.

8 Where we get to in the '73 to '89 time
9 period is they have to -- they absolutely have to --
10 Pardue relies on Bedient totally for this -- they have
11 to have water contact with the waste. At most that
12 might get you the dissolved phase, because we don't have
13 a scour velocity, Your Honor, whatsoever, to get to the
14 particles getting out; and we don't have any evidence of
15 colloidal transfer.

16 But from '73 to '89 there is no evidence of
17 water contact with the waste because the Highway 90
18 gauge data is totally out of this case, period. Tidal
19 action is totally out of this case prior to July 1,
20 1989. So we don't have flooding, we don't have tides.
21 The best they might be able to do is if they can line up
22 photographs between '73 and July 1, 1989, and prove that
23 there was water exchange between the river and the
24 interior of the pit.

25 But they can't get there because they

1 cannot prove what the depth of any alleged breach is;
2 and, thus, they cannot prove that there was actual
3 exchange within or without the pit. As we've talked
4 about in this case, that eastern impoundment was a place
5 to collect water during the operation and is a place
6 that could have collected rainwater; but they have the
7 burden to prove that that is actual exchange in the
8 river. So prior to '89 goes out the window.

9 In terms of post '89 where they have some
10 evidence of inundation, what Dr. Pardue actually talked
11 about, when he talked about the material getting into
12 the river, and this was on their slide deck, is that he
13 believes that there is a potential that that material
14 could be subject to erosion. He believes that if it
15 were like cardboard, that that would, quote, suggest to
16 him that it would be, quote, "vulnerable to breaking
17 apart into the river."

18 That is no evidence, whatsoever. No
19 evidence, whatsoever, to say that "If this is like
20 cardboard, that I believe, taking that assumption, it
21 would be vulnerable and would suggest to me that it
22 would break apart." So, consequently, the material
23 getting into the river, itself, is out; and we don't
24 have evidence that it's ever dissolved into the water
25 column because there's no fingerprint analysis. Neither

1 do we have analysis that the colloidal transfer is going
2 on.

3 Your Honor, one of the other things they
4 pointed you to is where they got Pardue to give what
5 I'll call the penultimate opinion; and this was on Slide
6 34 of their deck where they were citing to October 21st.
7 Dr. Pardue was simply asked:

8 "QUESTION: Dr. Pardue, do you have an
9 opinion, based upon reasonable scientific certainty, on
10 whether there were daily releases from the impoundment
11 from February 15th, 1973 through March 30th of 2008?

12 "ANSWER: I do.

13 "QUESTION: What is that opinion, sir?

14 "ANSWER: That there were daily releases
15 from the impoundments during that time period."

16 That is classic ipse dixit. You have to
17 tie it back. And when we actually start to dissect his
18 specific opinions to see what he can tie back to where,
19 it totally falls apart. It's easy to get that answer to
20 the question when your own lawyer asks it of you; but
21 when you start to break down the time periods, break
22 down the transport mechanisms, suddenly we don't get
23 there. We don't have the material getting into the
24 river. We don't have any analysis to show that this
25 dioxin ever got out of the waste into the water column,

1 or that any colloid got out into the water column.

2 There's just no evidence there.

3 And, of course, Bedient is not a dioxin
4 expert at all and he cannot offer this jury or you any
5 evidence to say, "Well, I agree that dioxin got out."
6 To use a phrase that Mr. Carter coined yesterday about
7 the talking twins, only one head of the talking twins
8 can speak to dioxin. That's Pardue, who relies entirely
9 on the other head, Bedient, to give him some water
10 connection.

11 And Pardue agreed with that because he
12 said, "Well, you would have to have water and contact."
13 So that definitely kicks out prior to '89, and we just
14 don't have the scientific support after '89 to say that
15 anything was getting into the water from this site that
16 the defendants caused, suffered, allowed or permitted
17 under any of the statutes.

18 THE COURT: Give me just a second and then
19 I'll let you respond again, Mr. Wotring.

20 (Whereupon, after a discussion off the
21 record, the following proceedings were had:)

22 THE COURT: We're back on the record.
23 Mr. Reasoner, why don't you follow up and then I'll let
24 you respond, Mr. Wotring.

25 MS. HINTON: Then I need to join.

1 THE COURT: I understand. Off the record
2 for just a second.

3 (Whereupon, after a discussion off the
4 record, the following proceedings were had:)

5 THE COURT: So we're back on the record.
6 Mr. Reasoner.

7 MR. REASONER: Yes, Your Honor. Thank you.
8 Just to follow up very briefly on Mr. Stanfield's point,
9 this Court at this stage of the proceeding is to take
10 their evidence in a light most favorable. It is -- the
11 Court is not required to accept sweeping conclusory
12 statements as true, okay. That's clear under the law.

13 And what you have from Dr. Bedient and
14 Dr. Pardue in their statements, "Did you find a release
15 every day?

16 "Yes."

17 Those are conclusory statements. The Court
18 at this stage is to look at what the actual evidence is;
19 and when you do that, giving them the best of it, you
20 know, looking at it most favorably to them, you have
21 testimony from Pardue and Bedient that there is an
22 opportunity for release. We're not saying we agree with
23 it, but they're saying there is an opportunity for
24 release during both of these relevant time periods.

25 That's giving them the best of this

1 evidence and not considering conclusory statements that
2 are not evidence. And when you look at it in that
3 light, Your Honor, and you apply the standard, which is
4 not relaxed in any way, given the fact that just because
5 they have a great number of days, a directed verdict is
6 appropriate on the daily release issue.

7 THE COURT: Thank you. Ms. Hinton.

8 MS. HINTON: Your Honor, for the record,
9 MIMC joins in IP's motion for directed verdict on this
10 point, as well as the arguments of IP and Waste
11 Management of Texas.

12 THE COURT: Thank you.

13 Mr. Wotring, in your response could you
14 address what the evidence is, other than the ultimate
15 conclusion given by the experts of daily contact with
16 the river from February 15th, 1973 to July 1st, 1989?

17 MR. WOTRING: The evidence is, number one,
18 the ongoing breach in the berm throughout that period of
19 time. I don't think that's contested or will be
20 contested.

21 The fact there was a breach in the berm and
22 allowed the water to be in communication between the
23 inside of the eastern impoundments, plural, and the
24 river, I think, is the evidence established by
25 Dr. Pardue and by Dr. Bedient. And as a result, because

1 of that connection between the river and the inside of
2 the impoundments, there would have been a release of
3 dioxin during that period of time.

4 THE COURT: One of their arguments is that
5 even with the breach, there has to be evidence of what
6 the level of the water is in order for it to be in
7 contact with the waste in the impoundment and that we
8 don't have that. That's one of their arguments.

9 MR. WOTRING: That is one of their
10 arguments. I don't believe they have the evidence --
11 evidentiary support to support that particular argument.

12 What Dr. Bedient testified about was the
13 existence of the berm, that he saw the water of the
14 river in constant communication between the inside and
15 the outside of the eastern impoundments throughout that
16 period of time.

17 And if you go back to the *Malone* case,
18 which was a pits case that had to do with constant
19 discharges to the groundwater, if memory serves, and
20 that if you saw constant communication between the
21 groundwater, the jury could infer ongoing seepage. In
22 this case, instead of communication with groundwater,
23 it's communication with the surface water through that
24 ongoing breach on a daily basis.

25 THE COURT: So you believe that the

1 triggering mechanism for purposes of *Malone* is the
2 picture of the breach showing water connecting to the
3 impoundment?

4 MR. WOTRING: That's the start of it. Then
5 following up with the aerial photographs throughout the
6 early period of time showing that there was ongoing
7 communication and that that berm would never have healed
8 itself, I think, is the most apt analogy throughout the
9 entire period of time for the eastern impoundments.

10 We're getting into the actual release for
11 the Texas Water Pollution Control -- what we've been
12 calling the "General Prohibition"; and different
13 statutes, the Spill Act, the Solid Waste Disposal Act
14 don't always require an actual release. Sometimes it's
15 an eminent threat of harm -- sorry, eminent threat of
16 discharge adjacent to erecting eminent.

17 We can go through the specific statutes and
18 apply it differently, but I think that for our purposes,
19 Harris County has established there was an actual
20 release from the eastern impoundment, certainly from the
21 period we've been calling Period No. 2 and that
22 Dr. Bedient's testimony is sufficient to establish that
23 for every day based upon a reasonable scientific
24 probability and a preponderance of the evidence
25 standard.

1 Of course, at this stage we're not dealing
2 with preponderance of the evidence. We're dealing with
3 more than a scintilla of evidence. So that is our
4 evidence on that particular point.

5 THE COURT: Okay.

6 MR. WOTRING: Touching upon some of the
7 other issues that counsel for defendant had raised, we
8 would go back to the *Malone* case again. It is a pits
9 case and it is talking about a release downward as
10 opposed to out the side. But we think the analogy is
11 apt and that given the state of this record and that
12 there is going to be, I don't believe, any evidence of
13 any repair of the berms, certainly not at this stage of
14 the proceeding has there been any evidence of a repair
15 of the berms, and that that would have been an ongoing
16 release and then certainly through the period of time in
17 which the western part of the -- or the eastern part of
18 the western impoundment and the two eastern impoundments
19 would have been submerged, that would have been
20 sufficient for a daily release throughout that period of
21 time.

22 To sum Dr. Pardue and Dr. Bedient, I don't
23 think they felt -- and I don't know -- they certainly
24 did not feel that the issue about on ongoing release
25 after the July 1st submergence date was really a tough

1 issue or an issue that was really that much subject to
2 question; and at this stage in the proceeding, I don't
3 believe there has been much question about that during
4 the period of time in which they were inundated by the
5 river, there would have been ongoing releases.

6 So they talked about at this stage of the
7 proceeding the Court should construe the evidence most
8 favorable to Harris County. We believe that is the
9 standard. What we have put into this record right now
10 in responding to the motion for directed verdict are
11 some of the foundational facts that support our experts'
12 opinions. And then we have put the ultimate opinions.

13 To respond to their motion for directed
14 verdict in any other way would require us to put the
15 entirety of the record in this response to motion for
16 directed verdict, which we don't think is required.

17 The quotations from our experts that we
18 have put in the record in response to the motion for
19 directed verdict are based upon their foundational work.
20 That foundational work is described in their testimony
21 from the stand as sufficient to support the conclusions
22 that they have reached in this case, which is that there
23 are ongoing daily releases from February 15th, 1973
24 through March 30th of 2008.

25 I guess with regard to a couple other

1 specific points, there is an issue about whether all of
2 the dioxin could have been released via a dredging
3 mechanism, which I think counsel in questioning with our
4 experts suggested happened in the '70s or the '90s.
5 Depending on either the '70s or the '90s, if dredging
6 were another mechanism for release, it would be Harris
7 County's opinion that defendants are still responsible
8 for that and that would still fall within the common
9 practice language of the general prohibition and the
10 other two statutes that -- under which it has sued. So
11 approving its dredging does not absolve them of legal
12 liability for the ongoing releases; and at this stage of
13 the proceeding, I think all that has been done.

14 THE COURT: Your point is that even if the
15 dredging wasn't their responsibility, they would have a
16 responsibility to do something in response to the
17 dredging?

18 MR. WOTRING: Exactly. And that they
19 cannot escape liability for the release of dioxin into
20 the San Jacinto River because somebody else dredged into
21 it, given the circumstances of this case, which indeed
22 has been puzzling to us why they would attempt there was
23 ongoing releases from a third party because under our
24 view of the law, we don't think that absolves them.

25 So that wouldn't excuse their conduct,

1 wouldn't absolve them for liability under the liability
2 statutes we've sued them. It might provide some limited
3 defense under some limited circumstances, but certainly
4 not absolve them from daily releases caused by dioxin.
5 I think -- we don't have to forecast what is going to
6 happen when they put their experts on the stand for that
7 particular issue.

8 Just a couple of the specific points that
9 they have brought up. Slowiak was talking about the
10 2,3,7,8-TCDD at the Site. The Site is defined in that
11 deposition. I may be wrong about this. I think it was
12 the EPA's definition of the Site, which is broader than
13 just the impoundments. That's a minor point.

14 The other point that has been raised is
15 whether Pardue needed to do fingerprinting for the waste
16 before he can offer his opinions. I don't think that's
17 supported by the evidence and certainly not at this
18 stage of the proceeding, that Pardue would have to do
19 fingerprinting to testify that there had been ongoing
20 releases on a daily basis from the impoundments.

21 The significance of his testimony about
22 finding dioxin in the layer where the waste is contained
23 is the fact that it has been defendants' contention that
24 dioxin is so hydrophobic that it will never get
25 dissolved in water. That test actually refutes that

1 theory, and we see that many years after the waste was
2 deposited there, that it is still -- has water inside
3 the layer of the waste and that water inside the layer
4 of the paper mill sludge, even many decades later, still
5 has significant amounts of 2,3,7,8-TCDD.

6 If memory serves, that was the reading that
7 showed there were 2,700 parts per picogram per liter, I
8 think, was the significance of that reading, showing
9 that dioxin from the paper mill sludge would dissolve
10 into the water either on the colloids or the suspended
11 solids phase of the water inside the waste level.

12 Your Honor, I think that responds to all
13 the specific points that have been raised. One minor
14 point I would say is that I'm not going to buy in and
15 accept this idea that Dr. Pardue and Dr. Bedient are
16 somehow talking twins. They are not and do not testify
17 as a predominant area of their living or their
18 occupation. They are noted and reputable professors.

19 Dr. Bedient has done significant work for
20 our community at Rice University. Dr. Pardue in his
21 stead has done significant work at LSU. And I'm not
22 going to accept this idea that they're somehow talking
23 twins.

24 And I would note for the record and for
25 them that even their own expert, Defendants' own expert,

1 Dr. Adriaens, has recognized Dr. Pardue's reputation and
2 his quality of his science in this matter. So every
3 time they want to say "the talking twins," they're going
4 to hear me say something in response to it; and if we
5 need to go further down that line, I'll start reading
6 their CV's and the records of their service, which I
7 believe is unmatched by the Defendants' experts.

8 THE COURT: And you're referencing also
9 Dr. Pardue working on the Passaic River?

10 MR. WOTRING: Exactly so.

11 THE COURT: All right.

12 MR. STANFIELD: Let me address *Malone* real
13 quick. Just to be clear, we just -- *Malone* is not a
14 Supreme Court of Texas opinion. We don't believe it's
15 binding in this case. *Malone* relied in part in reaching
16 its conclusion on the *Pet Foods case*, not the *Best Foods*
17 case, but the *Pet Foods case* in the Supreme Court of
18 Texas which talked about air emission discharges.

19 And in that case --

20 THE COURT: Could you give me a minute?
21 This is the lady with regard to the juror.

22 (Whereupon, after a break, the following
23 proceedings were had:)

24 THE COURT: We are back on the record.

25 MR. STANFIELD: Just picking up where we

1 left off briefly, I just wanted to note that we believe,
2 and this is going to come into the Charge conference,
3 that the *Pet Foods* opinion from the Supreme Court of
4 Texas we think implicates how the jury should be
5 charged. That is an opinion on which the *Malone* case
6 rests in part on a misreading of the *Pet Foods* decision
7 as to how you charge a jury and what the evidence is
8 needed of daily releases.

9 In any event, just to circle back to what
10 Bedient actually testified when it comes to this breach
11 is that he stated, and this is on October 23rd of his
12 trial testimony, that he only believes the opportunity
13 would be there as a result of the breach were exchanged
14 on that day and went on to state that he did not know
15 the exact elevation of water and all of that on that
16 particular day. I -- I don't know. And so he could not
17 get an exchange of water opinion, and that is what
18 Dr. Pardue rests on.

19 I do want to note, as well, Your Honor, in
20 terms of the new theory which we've heard today about
21 now an emanate threat of discharge, that is an unpleaded
22 theory. We have not tried it on consent. We object to
23 it, just as we object to this new theory about some sort
24 of scheme that would give rise to liability out of the
25 statute. Conspiracy is out of this case. It's been out

1 of this case.

2 There is an enormous problem with the
3 shifting sands of the governmental theory coming from
4 Harris County and at times supported by TCEQ as to how
5 they can hold us liable. They pleaded a theory that on
6 each and every day of the penalty period, a release was
7 caused. Now we're hearing a different theory about some
8 sort of emanant threat that may come under one or more
9 of the three statutes. That is unpleaded. It has not
10 been tried by consent. They have no evidence of that.
11 We object to it. Similar on some unknown scheme.

12 And, Your Honor, frankly, this gets to a
13 larger problem and it's something that Mr. Benedict
14 said, and Mr. Wotring followed up on it when he talked
15 about, "Well, let's look at the circumstances of this
16 case and there is no bright line." That is an enormous
17 problem, Your Honor. A statutory theory has to be put
18 forward that is neither vague nor overbroad and is
19 easily understandable by every day Texans.

20 These statutes apply to everyone in this
21 state. We are all entitled to be on notice as to what
22 conduct is regulated and when you violate the statute.
23 What has been put forward by the government in this
24 case, both on the state and the local level, is that you
25 have no idea whether or not you're in violation of the

1 statute unless and until they decide to tell you you are
2 in violation by bringing a lawsuit, which, of course,
3 now they state you don't have to be on notice of a
4 violation, you don't have to be given any opportunity to
5 respond to a notice of violation, none of that.

6 And that is an absurd unconstitutional
7 reading of the statutes. They have to have a certain
8 definite meaning that people can understand what conduct
9 is being regulated. And so that is a general point and
10 a specific point to this case is we are not trying extra
11 issues by consent. They are stuck with their pleading.
12 They don't have the evidence of a daily release. At
13 most they have an opportunity. That is not going to be
14 enough.

15 And just another point. Frankly, I don't
16 care what Dr. Bedient or Dr. Pardue felt about their
17 testimony or felt about a possible release, and neither
18 should anybody else. The fact of the matter is they
19 have to offer competent expert testimony that, in fact,
20 there was something beyond a mere possibility of
21 colloidal or dissolving transport or material getting
22 into the water. They don't have that.

23 Unlike the *Malone* case, we do not have any
24 date certain as to when these releases actually
25 occurred; and that is why fingerprinting is important

1 because it is in evidence in this case that there are
2 many sources of dioxin. It is in evidence in this case
3 that there were readings up and down the river,
4 including the surface water over their site.

5 There is no evidence that that dioxin came
6 from this site. We have to be held liable for what we
7 allegedly did, which is also why dredging cannot be
8 attributable to us, and we'll get into this if we're
9 allowed.

10 Of course, we have a third-party negligence
11 defense in this case. It is still part of this case.
12 We're not held liable for that. So let's stay focused
13 on the specific issue here, which is not this
14 wide-ranging issue. It's Pardue and Bedient introduced
15 actual evidence of actual releases from this site of the
16 TCDD from the Pasadena mill. The answer to that is
17 "no." They have found some dioxin in the river, period.
18 They have found some dioxin within the waste material in
19 the pit that had not been released, period.

20 MS. HINTON: Your Honor, MIMC would join in
21 counsel for IP's argument that we do not consent to
22 trial on any theory, emanant threat of discharge, or
23 this new theory as a scheme. So we would object and
24 note for the record that we are not agreeing to try by
25 consent these new theories that have not been pled.

1 MR. REASONER: Your Honor, Waste Management
2 of Texas joins in the argument of both these counsel. I
3 would just note again, the admission of impossibility of
4 identifying a release on a particular day is fatal to
5 their argument here and they have given no basis for
6 altering their evidentiary burden. Also as to dredging,
7 we -- just to note for the record, we believe that
8 absolutely goes to causation and whether any penalty is
9 appropriate in a circumstance where a third party causes
10 the release. So, thank you.

11 THE COURT: Thank you.

12 Mr. Wotring, anything further?

13 MR. WOTRING: No. Frankly, I think the
14 evidence stands for itself and so does our argument.

15 THE COURT: Let's move on to the next
16 motion.

17 MR. STANFIELD: Your Honor, International
18 Paper moves for a directed verdict on the basis that
19 it -- that neither it nor Champion caused, suffered,
20 allowed or permitted a violation. It is undisputed in
21 this case that control is key.

22 Jen, can you take me to Slide -- never
23 mind. I'm there.

24 Undisputed that control is key to this
25 case.

1 Your Honor, in opening statement counsel
2 for Harris County stated, "They just have to have the
3 power to stop the sludge from getting into the river."
4 That's a statement made to the jury. That is also in
5 line with the argument made in summary judgment by
6 Harris County that you have to have the right or power
7 to stop the discharge. Control is key to this case, and
8 control is something that Champion and IP were lacking.

9 Your Honor, you raised a great question
10 yesterday at the end of the day which has never been
11 answered by government lawyers, either for the County or
12 the State, which is: When does ownership of waste end?
13 Does it ever end? Can it ever end? You have never
14 gotten an answer to that question. Neither have we.

15 But the reality is that it does end and
16 there are two ways it can end, which we've talked about
17 briefly. One is under the common law rule, just kind of
18 a waste law that it ends when you hand your waste over
19 either at the point of collection or the point of
20 deposition into the landfill; or second, under Texas
21 fixture law.

22 We've covered all of that, but it is
23 important to circle back to the point that you raise,
24 which is, can you ever get rid of your waste under the
25 governmental theories that are being put forward by the

1 local and state government in this case?

2 And under their theory you cannot and that
3 is overbroad, and that's not something that every day
4 Texans, whether on the corporate or the personal level,
5 are aware of. And it gives rise really to unbridled,
6 unlimited liability because under that theory, for
7 example, if back in the '60s you had changed the oil in
8 your car and say it was permissible to put it out in a
9 can on the street corner, gets delivered to a landfill
10 at the time that's owned, operated by someone else, land
11 owned by someone else, government approved, it leaks
12 years later and anybody who put oil or whatever it may
13 be, maybe paint cans with lead paint in them at the time
14 and you've got discharge now, you could be liable for
15 \$25,000 a day.

16 That's not what the law is. You have to
17 have control, the right or power to stop the discharge
18 at the Site. Here, Champion and IP lack such control at
19 the time of the discharges.

20 And again, it is important to have a time
21 element here because whether we start in 1973 with the
22 general discharge statute, 1975 with the Solid Waste
23 Disposal Act, or 1985 with the Spill Act, neither
24 Champion nor IP had the right or power to stop any
25 alleged discharge at the Site.

1 This Court has already ruled that we lacked
2 contractual control over MIMC who, as you know, we don't
3 contend owned the Site. This Court has already ruled
4 they are not record title. It would have been Virgil
5 McGinnes. It goes back to the landowner. We never had
6 contractual control over Virgil. But to the extent that
7 McGinnes could have exercised control, I don't know what
8 that could have been. To the extent they could have
9 been, we, Champion, or IP, certainly had no contractual
10 control at the time of the discharges. The Court has
11 ruled that.

12 And consequently, we can't be liable for
13 any conduct of any other defendant in this case. And
14 there's no other basis for control, other than potential
15 ownership of the waste, which, as we've talked about
16 already, even if we did own the waste, which we dispute,
17 even if we did, at best it would have been affirmatively
18 unlawful for us to enter upon the land of another, take
19 bulldozers or whatever else it would have been to try to
20 excavate it out. We did not have the right and the
21 power to do so.

22 The best that we have heard from the
23 government side of this case is that maybe we could have
24 made a phone call, maybe we could have written a letter.
25 That is the right or power maybe to make a phone call or

1 a letter. That is not right or power to stop the
2 release. And that is exactly how the County's attorneys
3 framed it to the jury in opening, which is correct.
4 They have to have had the power to stop the sludge from
5 entering the river. We didn't have that.

6 We talked about this briefly, Your Honor,
7 on Friday when we were off the record. We were
8 discussing this issue, as you remember, and then all of
9 a sudden this new theory of scheming came up. And I say
10 it's new in the sense that it's never been pleaded
11 outside of the conspiracy claim, which is out of this
12 case.

13 We object to this. We're not going to try
14 this by consent. We have not tried it by consent. But
15 in any event, it's totally unclear what that theory
16 would be and how it would give rise to liability under
17 the statutes -- under the statutes.

18 Of course, there is no evidence of some
19 untoward scheme. To the extent there is evidence that
20 there was cooperation to put the material in the
21 landfill, that is not in dispute. The County has said
22 that's not in dispute. Of course, all of the parties in
23 this room, other than Waste Management of Texas, who did
24 not exist, were fully involved in that purported scheme.
25 Even TCEQ's predecessor did an investigation of the

1 Site, never brought charges, never said to shut down the
2 operation or to remove the material.

3 Now, to the extent there was a scheme, it
4 would have had to have been in place; and it's not
5 actionable. It would have had to have been in place
6 during the penalty period. There's no evidence of that.
7 We object to this new theory.

8 Your Honor, we've been through the evidence
9 of what actually happened at the time -- what actually
10 happened when Champion may have had some control.
11 Nothing untoward happened. Dr. Quebedeaux was totally
12 involved. And so, consequently, that can't be any basis
13 for our liability, what we did at the time.

14 When you look at the penalty period, we
15 don't have the right or power to control. So that
16 knocked out the general discharge statute and the Solid
17 Waste Disposal Act.

18 Harris County has also raised the prospect
19 that we "caused, suffered, allowed, or permitted" MIMC
20 as the owner/operator of the facility to violate the
21 Spill Act. Again, Your Honor, that depends on a right
22 of control that did not exist at the time of the
23 violation.

24 I'll just run through these quickly. On
25 the Solid Waste Disposal Act, you know that we have a

1 fundamental disagreement with how that works.
2 Nonetheless, nonetheless, our activity needed to occur
3 during the course of the statute. Nothing we did was in
4 effect during the course of the statute. Nothing we
5 could have controlled. That operative rule went into
6 effect in '75. There is no retroactive application of
7 it, and the way the Solid Waste Disposal Act works is
8 that we had to have conducted a disposal operation in
9 such a manner as to cause a problem. That didn't happen
10 in '75 or afterwards.

11 We've been through some of these arguments
12 before, and we would just reurge that the passive
13 migration theory that was put forward by TCEQ as part of
14 the *Phenyl Oil* (phonetic) decision, we think that that
15 is not a reasonable reading and should not be accepted.
16 It's further in conflict with actual case law on the
17 subject.

18 In terms of the Spill Act and what we could
19 be liable for, we disagree that we could have caused,
20 suffered, permitted or allowed. We also disagree that
21 as a fundamental element of that claim that the harmful
22 quantities has been met there.

23 The Court made a ruling that you agreed
24 with TCEQ's reading of the statute. It's a little
25 unclear to me, personally, which reading you accepted

1 because I think they offered two. One was that you
2 don't ever have to show a harmful quantity because of
3 use of the phrase "those substances" in the statute. We
4 don't think that's a reasonable reading of the statute,
5 Your Honor, because then that leaves out the prior
6 clause.

7 And take into absurdity, which any statute
8 could and, as you know, we would submit this case as an
9 example of that, that presumably then -- let's say
10 gasoline is a hazardous substance. You could be filling
11 your boat out on the dock, drop a drop of gasoline in
12 and have liability under the Spill Act and have to take
13 some specific action of liability.

14 That's not reasonable, Your Honor. We
15 think that the most reasonable reading is that you have
16 to have a harmful quantity of hazardous substance proved
17 on every day on which you were seeking that violation.
18 They don't have any evidence of that because, as we've
19 talked about, the EPA has never specified that amount.

20 You've already rejected the view that the
21 1 pound applies and, even if it didn't, that couldn't be
22 met here. But this is where we talk about the fact that
23 we disagree with the State's reading of the Spill Act.

24 And just briefly, Your Honor, just to
25 remind you, Dr. Pardue has explicitly testified during

1 trial that he has no opinion about the amount or the
2 source of dioxin in the San Jacinto River. That goes to
3 the general lack of proof that's specifically under the
4 Spill Act, as well. He testified to that on October 21.
5 Dr. Bedient similarly stated on October 23rd he's not
6 giving any calculations.

7 And, Your Honor, to the extent that this
8 particular argument about the Unilateral Administrative
9 Order is the TCEQ argument the Court was relying on, we
10 understood that they were arguing perhaps that the Court
11 could rely on a Unilateral Administrative Order to
12 establish that a harmful quantity got out. Of course,
13 that doesn't particularize to any day. It doesn't
14 particularize any day within the penalty period and is
15 not in evidence in this case and so cannot defeat a
16 directed verdict.

17 And, Your Honor, I will stop there because
18 my next point is attorney's fees.

19 MR. ROSS: Your Honor, on behalf of Waste
20 Management of Texas, much of this last motion is unique
21 to IP, and so we will leave it at that.

22 Waste Management of Texas would
23 respectfully join the motion to the extent it bears on
24 the harmful quantities issue in the Texas Spill Act and
25 we will respectfully wait our turn to make the rest of

1 our presentation on the Spill Act. We have our own
2 unique arguments.

3 THE COURT: Thank you, Mr. Ross.

4 MS. HINTON: And MIMC joins in that same
5 portion of IP's argument and we'll also have additional
6 items during our presentation.

7 THE COURT: All right. Response.

8 MR. WOTRING: In response, we didn't start
9 this morning with the response to the Court's question
10 of last evening because we started dealing with the how
11 are we going to handle the stipulation with respect to
12 some statements made in opening argument.

13 The Court's question was about the extent
14 of Champion's liability for the sludge it produced, the
15 sludge it hired somebody to take away, the sludge it
16 recognized as being its own, in the possessive tense,
17 both in 1965 and then later, we would argue, at the
18 deposition of its corporate representative all the way
19 in 2014.

20 Given the circumstances in this case, and I
21 think we will limit our comments on behalf of Harris
22 County. I'll limit my comments to the circumstances of
23 this case; yes, we would argue that Champion's liability
24 for the sludge would extend to the end of the penalty
25 period. The Court inquired about whether it would

1 extend until today. My only hesitation about getting
2 into the post-penalty period is because of the ongoing
3 Superfund process, and I don't want to be characterized
4 as having -- on behalf of Harris County or otherwise
5 offered an opinion about whether the Superfund process
6 might affect ownership responsibilities of Champion or
7 the allocation of responsibilities between the different
8 defendants.

9 THE COURT: To be clear on my question, it
10 was really more of a theoretical one in terms of, if
11 your argument is that they continued to have ownership
12 after they deposited at a site, then when,
13 theoretically, does that ownership end; or is your
14 position that unless they take affirmative steps to
15 transfer ownership, that that ownership continues on ad
16 infinitum.

17 MR. WOTRING: And perhaps the way to back
18 into the Court's question, with the Court's permission,
19 is to think about a site that has not been involved and
20 has never been involved in a federal Superfund project
21 similar in nature in which Champion deposited its
22 sludge, let's say, in the Pasadena landfill, which was
23 also ongoing. It is not a federal Superfund process
24 because Harris County is not raising federal claims and
25 does not want to interfere with the federal Superfund

1 process in any way, as it's repeatedly argued throughout
2 this case.

3 Given the circumstances of this case and
4 given the way it was handled by Champion and handled by
5 MIMC, yes, we would argue it had ongoing responsibility
6 for the sludge they placed at the site that would
7 continue in nature and continue on through the penalty
8 period and on until they did something affirmatively
9 about it.

10 Now, we are limiting our comments to
11 Champion in this case and these circumstances. I don't
12 think we have to defend paint can analogies, spilling
13 gasoline when you fill up your boat. Those are
14 different cases and different circumstances and
15 incomplete hypotheticals.

16 But in this case, since they recognized it
17 was their waste, since they recognized both in 1965 and
18 2014 it was their waste, and they did not contract away
19 the ownership of the sludge, yes, we believe they had
20 ongoing ownership interest in the sludge and that that
21 ownership interest is sufficient to trigger liability
22 under the environmental statutes under which they had
23 been sued.

24 And to refresh the Court's memory about
25 where ownership stands of the sludge, according to

1 defendants, Champion owned it until they put it on the
2 barge that was owned by MIMC. When it's on the barge
3 owned by MIMC, it's unclear who owned it, according to
4 defendants. There is -- well, you have to pick a
5 defendant and then they will identify who they think
6 owned it. It's not clear why they think it transferred
7 ownership on the barge because at that point in time,
8 it's in a slippery slurry stage. But once it gets off
9 the barge and it's on the land, it's unclear when, but
10 both defendants think it magically becomes part of
11 Virgil McGinnes' property. It's the -- the period of
12 time when it's on the barge that no defendant can offer
13 a coherent explanation. They certainly can't together
14 offer a coherent explanation as to the ownership of the
15 sludge, itself.

16 We would put to the Court that's an
17 incoherent theory altogether because it's crafted to try
18 to avoid liability and crafted in such a way that it
19 doesn't make sense and certainly cannot be crafted in
20 such a way to avoid liability under the Texas Water Code
21 and the other statutes under which they have been sued.

22 We do believe that because of the control
23 that Champion had over its sludge that it can be held
24 liable under the Spill Act and the two environmental
25 statutes. We don't believe that anything we have said

1 in argument in the motion for directed verdict stage is
2 a new theory. We don't believe that any of the
3 discussions we've had about the fact that even if
4 ownership was not an issue, they would still be liable
5 under the statute is a new theory or that they have any
6 reasonable basis for objecting to the evidence that has
7 already been put into the record without objection about
8 both the nature of the release being into the water or
9 adjacent to the water. Those theories were in our
10 original Charge, or in our discovery responses; and all
11 that evidence has come into the record without
12 objection.

13 But that's a separate issue. We're at the
14 motion for directed verdict stage, and at this stage the
15 legal matter is there is evidence of Champion's
16 ownership, there is evidence of Champion's contractual
17 right on through the beginning of the Texas Water Code
18 to establish its liability under the general
19 prohibition, the Texas Spill Act, the Solid Waste
20 Disposal Act.

21 Other than that, I would adopt our legal
22 briefing and authorities in response to the various
23 motions for summary judgment and other motions that
24 International Paper has filed on this particular issue.

25 THE COURT: Okay. Mr. Stanfield.

1 MR. STANFIELD: Your Honor, just to be
2 clear, not once during that argument was it identified
3 to you what our right and power to stop the discharge
4 would be on someone else's land, whether McGinnes in his
5 individual capacity owned the land or whether McGinnes
6 Industrial Maintenance Corporation owned the land or
7 whether the Port of Houston Authority at some point
8 owned the land. It does not matter for purposes of
9 International Paper and Champion because we had no right
10 and no power to stop the sludge material from entering
11 the river at any point in time during the penalty
12 period. That is black letter law. There is nothing
13 magical about it. There is nothing crafted about it.
14 It is simply Texas law that we do not own and have the
15 right and power to act on someone else's real property.

16 In terms of the fact that transfer to the
17 landowner, there's nothing -- to use the term "magical"
18 or "crafted" about that, either. The dispute about who
19 owned it on the barge is totally irrelevant to this case
20 at this point. It is totally irrelevant. That is not
21 part of the County's theory of any discharge. It's not
22 even in the penalty period.

23 So we can just throw that out the window.
24 It doesn't matter. We've talked about that in terms of
25 when our ownership ended, but it doesn't matter who

1 picked up ownership at that period because for purposes
2 of our discussion here under black letter Texas law, it
3 became part of the realty, it became the realty owners.
4 That is black letter Texas law starting with the Texas
5 Supreme Court in the 1800's, moving forward through
6 today.

7 And, Your Honor, if I were going to stack
8 up the cases in front of you from the Supreme Court of
9 Texas going through what that law is, they would be
10 quite tall. If I took the Court of Appeals' opinion,
11 stacking up fixture law, it would be incredibly tall, as
12 well. And if I took their two opinions, which I submit
13 would go in my piles about asbestos pipe and a carbon
14 monoxide emitting furnace, it would be quite small and
15 even those wouldn't support their opinion because in
16 those cases, when we talk about improving value, those
17 things did not improve the value, but were considered
18 fixtures.

19 Your Honor, we have to have circumstances
20 that give rise to ongoing liability in the penalty
21 period, and we do not have any of those. We have to
22 have a statutory reading of these statutes that is
23 constitutionally permissible such that we can -- and you
24 in particular in deciding this directed verdict, can
25 establish what gives rise to liability and has it been

1 met based upon this record.

2 Consequently, talking about under the
3 circumstances of this case is entirely unhelpful, unless
4 and until we get a statutory reading of each statute
5 that then states "Here are the markers of when liability
6 is triggered." Consequently, I can take the evidence,
7 put it up against those markers and say is liability
8 triggered. The only markers you have are the right and
9 power to control, and there is no evidence that we have
10 it. In fact, the evidence is we did not own the land.
11 We did not control the land. Certainly we did not cause
12 subsidence or control subsidence. We did not cause
13 dredging or control dredging.

14 In terms of the last point that was made
15 about the contract, there is no dispute. As a matter of
16 law, after 1971, we had no contractual control. No
17 contractual control, whatsoever, that could somehow
18 allow us to exercise a right on this Site and give us
19 the right or power to stop the sludge from entering the
20 river, exactly how the County has framed the issue in
21 this case and with which we would agree with that. We
22 have to have the right or power at the time of the
23 discharge to stop the discharge.

24 And, of course, we submit that our contract
25 that's relevant to this case ended in 1966, Your Honor.

1 MR. WOTRING: That's an interesting point,
2 and let me go to that one. The contract can't end in
3 1966 because the only site that contract could be about,
4 given the evidence in this case, is this existing site
5 because all other evidence of the Hall's Bayou site has
6 been excluded. What is relevant in the record -- I
7 don't think that's a make or break for the directed
8 verdict, but it's an interesting issue. The only site
9 that contract could be about given the current state of
10 the record is this site, not the Hall's Bayou site.

11 But back to the point on ownership. We
12 think ownership gave them sufficient control and
13 sufficient nexus under the case law to trigger liability
14 under the environmental statutes. We also think that if
15 they had placed this waste beyond their control after
16 1967 and thereafter, that they aren't liable under the
17 environment statutes for causing, suffering, allowing,
18 permitting the water of the State of Texas as we have
19 framed it in our -- certainly in our Charge that we've
20 submitted to the Court.

21 The struggle in this case has been and will
22 continue to be, I think, the Defendants' refusal to
23 accept the fact that cause, suffer, allow, or permit is
24 extremely broad, has remained extremely broad in the law
25 and is sufficiently within the confines of other areas

1 of the law which also have broad phrasing. This, as I
2 think the case law we submitted to the Court, is one of
3 the broadest phrases that you can have imposing
4 liability on people to protect the water of the State of
5 Texas.

6 And to the extent we need -- well, I don't
7 think we need to go further. We just simply adopt the
8 remainder of our legal arguments we made on this
9 particular issue at the summary judgment stage.

10 MR. STANFIELD: And I'd ask the Court to
11 take judicial notice of the authorities and arguments
12 that we have made in our briefing to this point.

13 And just one final thing on that, Your
14 Honor. Nexus argument is not in the statute. And then
15 this argument about if you place it beyond your control,
16 you have liability under the statute, there's no
17 statutory basis for that either. And, in fact, that
18 just feeds into the point we were talking about is,
19 there is -- under the governmental theory as Harris
20 County is putting it forward, I don't know if it's
21 adopted by the State, under that theory there is
22 absolute liability for a waste generator under these
23 statutes, period. You can never lose that liability.
24 That may be CERCLA liability for cleanup. Of course,
25 this is not a cleanup case. This is about imposing

1 punishment on people; and under this theory that has
2 been put forward, if you have absolute liability for all
3 time for any waste that you generated that causes a
4 problem under these statutes. That is not the law and
5 that is not the intent.

6 And, thus, even though cause, suffer,
7 permit and allow may be broad, it cannot, as a
8 constitutional matter, be overbroad.

9 THE COURT: All right. Let's move on to
10 the next motion.

11 MR. STANFIELD: I think my co-defendants
12 want to do their --

13 (Whereupon, after a discussion off the
14 record, the following proceedings were had:)

15 MR. STANFIELD: Your Honor, just briefly.
16 International Paper moves for directed verdict on the
17 attorney's fees claim from the County. Their evidence
18 is insufficient as a matter of law on several bases.

19 We put in the outline to the Court, and
20 I'll put into the record, there are a couple of key
21 cases. One is the *E1 Apple 1 Limited vs. Olivas* case,
22 370 S.W.3d 757, Supreme Court of Texas 2012. And as the
23 Supreme Court noted, there has to be sufficient evidence
24 introduced into the case to make a meaningful evaluation
25 of the application for attorney's fees.

1 You cannot have charges for duplicative,
2 excessive or inadequately documented work, and those
3 have to be excluded. And you have to be able to make a
4 meaningful review of the hours claimed because, as in
5 this case, the usual incentive to charge only reasonable
6 attorney's fees goes away when those fees are going to
7 be paid by the opposing party, or here not being paid by
8 anyone unless the opposing party is going to pay those.

9 At a minimum, Your Honor, the document
10 doesn't show what services were performed, who performed
11 them, and at what hourly rate, when they were performed
12 and how much time the work required.

13 Your Honor, here what is fundamentally
14 missing from the evidence from the stand and from the
15 attorney's fees records in evidence are what services
16 were performed. We have no idea. We do know who is
17 performing them. We do know what rate is being charged
18 and generally how much time is being spent, but we don't
19 know how it's working.

20 And in particular, that becomes a problem
21 for segregation because what Ms. Baker testified is she
22 segregated out two categories of fees; one was the
23 conspiracy claim, which she said could be up to
24 5 percent, so she did not do a proper segregation. And
25 also she did the counterclaims, which she said she

1 thought could be up to 10 percent. But notably, she
2 could not state for any record on those attorney's fees
3 invoices who was doing anything on what particular day.

4 She basically stated that she was going
5 from memory for three years and doing some rough
6 calculation, which was not precise, and stating,
7 consequently, she's doing some sort of segregation.
8 That is insufficient under the law. And as the Supreme
9 Court stated just this year in *Long v. Griffin*, which is
10 not yet in the *Southwest Reporter*, but it's 2014 Westlaw
11 1643271 at Page 3, that without any evidence of the time
12 spent on specific tasks, the trial court had
13 insufficient information to meaningfully review the fee
14 request.

15 Black letter law, their request fails as a
16 whole because they can't properly segregate; and even if
17 they could segregate, they can't properly provide the
18 Court evidence of what specifically they were doing on
19 any given day.

20 Further, the conditional fees for appellate
21 proceedings is deficient. We would cite the Court to
22 the *Sentinel Integrity Solutions, Inc., versus Mistras*
23 *Group, Inc.* case, 414 S.W.3d 911. There, basing on the
24 *El Apple* opinion, they say that the very general
25 testimony that appellee would incur about 150,000 in

1 fees if the case were appealed to this court and an
2 additional 50,000 in fees in the event of an appeal to
3 the Texas Supreme Court was not sufficient. That's
4 exactly what the Court heard.

5 "I talked to someone. I think it might be
6 250,000 to the Court of Appeals. I think it might be
7 250,000 to the Supreme Court," that's not -- that's not
8 sufficient.

9 And finally, we would submit as a matter of
10 law, having four partners at \$900 an hour and paralegals
11 at 200 an hour, doing all the work in this case,
12 document review, redactions, everything, is just
13 fundamentally unreasonable as a matter of law.

14 Consequently, we move for a directed
15 verdict on attorney's fees. I don't know --

16 MS. HINTON: MIMC joins in IP's motion
17 relating to attorney's fees, Your Honor; and we
18 incorporate the arguments of counsel.

19 MS. BALLESTEROS: And Waste Management of
20 Texas likewise joins in the directed verdict motion on
21 attorney's fees and would adopt those arguments.

22 MR. GEORGE: The case they're relying on,
23 the *E1 Apple* and the *Long* case, are not traditional
24 attorney's fees cases. They are a special category of
25 lodestar where the fee is -- you go to the Court and you

1 say, "Those fees would not normally be enough. You need
2 to multiply it" and ask the Court to award a multiplier
3 fee.

4 That has special requirements and special
5 analysis and needs more scrutiny, and these cases are
6 clearly lodestar cases and they're described as such to
7 clarify as opposed to the traditional.

8 This case is using a traditional award of
9 attorney's fees, that "We want a rate that we say is
10 reasonable times an hourly fee that we say is
11 reasonable," whereas in lodestar you admit that the
12 reasonable numbers are not sufficient and want the Court
13 to do more.

14 The Supreme Court, even in the *E1 Apple*
15 case, has said you do not need contemporaneous time
16 records. The people there were a little too general,
17 but the Court made clear you don't even have to show up
18 with time records. You probably should. We did. We
19 provided them. They are redacted.

20 Now, if -- and they have to be redacted to
21 avoid attorney/client privilege waiver. There's no
22 question of that, and they've made no objection, no
23 request to compel any further production. Instead, they
24 appear to take the redactions and then kind of lie
25 behind and claim they're going to be insufficient, even

1 though we had to redact to preserve privilege.

2 But we provided detailed 400-something
3 pages, by person, by day, and describing basically
4 whether it was, you know, attending something or
5 researching something or drafting something or what have
6 you.

7 Ms. Baker gave in great detail, you know,
8 how much was involved, how many motions, how many
9 hearings. I believe we tried to get too much into that.
10 We received a lot of objections. And because of the
11 limitations, we weren't able to go as far into that so
12 that had to be -- they can't both say you can't go there
13 and then claim it's insufficient.

14 But this evidence does support it. We get
15 to the segregation. The segregation law is found in
16 *Tony Gullo Motors versus Chapa*. I'll give the cite in a
17 second, if I can -- basically, the idea is you're
18 allowed to do segregation by percentages. You don't go
19 task by task. Here the standard does not require more
20 precise proof. You don't have to keep separate time
21 records for when you draft unrecoverable. The opinion
22 would have sufficed stating that, for example,
23 95 percent of their drafting time would have been
24 necessary, even without the unrecoverable. And that's
25 what Ms. Baker did.

1 Now, she did say up to five and up to ten.
2 I think in reality the conspiracy would take much less
3 than five, but we said five. The jury can do five and
4 ten. We've said that. I think her opinion was it was
5 probably less, but we're willing to go as far as five or
6 ten. So that is perfectly in line with what the Supreme
7 Court does.

8 Finally, the appellate attorney's fees, she
9 didn't just give up and give numbers. She did what an
10 expert is allowed to do, which is to confer with a
11 person -- the expert can rely on what someone normally
12 relies on, and she relied on someone who is eminently
13 qualified to speak to that, namely me; but she said she
14 consulted with somebody, somebody she has worked with,
15 who had great experience in determining the cost of
16 that, etcetera, and that's what she was given. That is
17 what a trial lawyer would do to determine appellate
18 attorney's fees. So that would be sufficient.

19 THE COURT: Thank you, Mr. George.

20 MR. WOTRING: Real briefly. I believe we
21 ran through the stand the number of depositions that
22 were taken in the case, the number of days of
23 deposition, the number of pleadings that were involved
24 in this case, and generally the amount of time -- or
25 specifically the amount of time and the details of what

1 had gone on -- details to some measure of what had gone
2 on in the case as a basis for the request of attorney's
3 fees of approximately \$10.6 million.

4 So we think there is more than a scintilla
5 of evidence to support the -- Harris County's request
6 for attorney's fees in this case.

7 MR. GEORGE: And just for the record, I
8 said I would give the *Gullo* cite. It's *Tony Gullo*,
9 G-U-L-L-O, *Motors versus Chapa*, C-H-A-P-A, 212 S.W.3d
10 299.

11 THE COURT: All right.

12 MR. STANFIELD: The only other thing I
13 wanted to say that I forgot to say is I do believe that
14 it's also incumbent upon the County to segregate their
15 fees by specific statutory claim they're making because,
16 of course, if they don't recover under all three
17 statutes for all the time periods that are being sought,
18 then they can't recover the fees for those days and
19 those time periods. So I think they needed to be
20 specific about that.

21 I'm very familiar, of course, with the *Tony*
22 *Gullo* case. I would just say that when you take *Tony*
23 *Gullo* through the recent opinions, there is a lot of
24 specificity required by the Supreme Court of Texas and
25 there are a number of attorneys who thought they had

1 recovered attorney's fees who no longer have them.

2 So, in any event, we stand on our motion on
3 that; and I think we can take a break, unless counsel
4 wants to further respond.

5 THE COURT: Did you want to respond any
6 further, Mr. George, on the issue with regard to
7 segregation of fees by statute and time period?

8 MR. GEORGE: The only last point is
9 segregation can't be a directed verdict ground because
10 evidence as of the *Gullo* case, evidence of unsegregated
11 fees is some evidence of the segregated and those were
12 always reverse and remand. So it couldn't result in a
13 directed verdict.

14 THE COURT: Anything further?

15 MR. STANFIELD: No, Your Honor.

16 THE COURT: Why don't we break and I'll see
17 you back in one hour.

18 (Whereupon, after a break, the following
19 proceedings were had:)

20 THE COURT: Are we moving on to the Waste
21 Management --

22 MR. GIBBS: We are, Your Honor.

23 If it please the Court, on behalf of Waste
24 Management of Texas we have our motion for instructed
25 verdict. Your Honor, at the outset I think it's

1 important to remind the Court as a point of reference in
2 reviewing our motion -- the grounds for our motion for
3 instructed verdict, that there has been a series of
4 admissions and undisputed facts as it pertains to Waste
5 Management of Texas and that confirm how narrow any
6 conceivable questions that HC might even inquire about
7 or suggest go to the jury exist on this record.

8 First, it is conceded and not in dispute
9 that Waste Management of Texas is not an owner or an
10 operator of the facility or site in question. It was in
11 no way involved in any activities which created the
12 opportunity for any risk of discharge, design or
13 construction of the site included. It was not
14 thereafter, as undisputed in the record, in any way
15 involved in any activities whatsoever related to the
16 maintenance of the facility or its operations.

17 For both Waste Management of Texas
18 individually and as alleged in the Harris County theory
19 in any way through GC Environmental, the relationship to
20 the facility in question argued against Waste Management
21 of Texas is solely as the owner of stock of a separate
22 corporation, which was for a limited time an operator of
23 a site for some nine months.

24 These two parties, that is, GCE and Waste
25 Management of Texas, whom the plaintiffs have stipulated

1 were and remained at all times separate corporations in
2 good standing, from MIMC and from each other, it has
3 been stipulated in the record that at all times each
4 separate corporation was separate and distinct from MIMC
5 and MIMC, in turn, from each of those two entities.

6 And the plaintiffs do not contend in this
7 case that MIMC was the alterego of either GCE or Waste
8 Management of Texas; and they have likewise stipulated
9 that they are not claiming in this case that they are
10 seeking or entitled to pierce the corporate veils of
11 MIMC, GCE, or Waste Management of Texas in any way.

12 Again, the sole basis for imposing
13 liability sought in pursuit here against Waste
14 Management of Texas is based upon a claim of a right of
15 control, which adheres in any parent or subsidiary
16 stockholder relationship standing alone; and that is
17 urged as a basis under the statute to impose liability
18 for, quote, "cause, suffer, allow, or permit" --
19 permitting discharges on any specific date on the
20 facility. And they have argued pursuant to that that
21 the exercise of the basic rights of a controlling
22 shareholder can be taken somehow as evidence of control
23 of a type rendering a parent directly liable for
24 allegedly failing to prevent a subsidiary corporation,
25 in turn, from permitting a discharge to occur.

1 Now, with that series of undisputed facts
2 and positions before the Court, I turn to specific
3 grounds for the remaining review of what is left of any
4 evidence that is purported to create an issue on any
5 relevant element of the cause of action that is
6 currently being pursued against Waste Management of
7 Texas. I'm going to -- I'm going to outline three
8 specific grounds on behalf of Waste Management, Your
9 Honor; and then some of my colleagues will follow up
10 with some brief explications on some of our other
11 grounds, some of which have been covered in part and we
12 won't repeat those parts that have been covered, if
13 that's acceptable to the Court.

14 THE COURT: Yes.

15 MR. GIBBS: There are issues here that we
16 are outlining which we believe are absolutely unique in
17 this case and on this record to Waste Management of
18 Texas. The Court has under related -- a related point
19 of law already, and correctly we believe, granted a
20 dismissal against Waste Management, Inc. We submit
21 that, based upon the same legal principles that have
22 been previously urged there, likewise Waste Management
23 of Texas should be dismissed at this point in time and
24 an instructed verdict granted.

25 We recognize that the Court has, since the

1 urging of that position at the outset of the case, now
2 given Harris County full opportunity to present whatever
3 evidence it could or has that might raise any arguable
4 disputed fact question to go to this jury upon which it
5 could impose liability against Waste Management of
6 Texas; and we submit that there is no evidence. You've
7 given them every opportunity, and here are the grounds:

8 First, in short, Harris County has failed
9 to present evidence sufficient to raise a fact question
10 on the claim that Waste Management of Texas caused,
11 suffered, allowed, or permitted any violation of the
12 Texas Water Code general discharge provision or the
13 Texas Spill Act. Importantly, the County fails to clear
14 this hurdle both with respect to the -- what we call the
15 "GC Environmental Era," that is April of 1992 to
16 December of 2003, and what we refer to, open quotes, the
17 "WMOT Era," January of 2004 to March of 2008.

18 Our Instructed Verdict Ground No. 1, Your
19 Honor, Harris County has not presented evidence that
20 GCE, during the period from April of 1992 to
21 December 30th of 2003, engaged in any conduct or
22 activity with respect to the site, number one; had any
23 knowledge of the alleged discharges, number two; or
24 otherwise had any affirmative connection to the site or
25 alleged discharges whatsoever, number three, apart, as

1 we have suggested, from GCE's mere corporate ownership
2 of MIMC's stock during this time period.

3 Now, in the case-in-chief, Harris County
4 submitted in total on this issue two documents and no
5 testimony regarding whether GCE caused, suffered,
6 allowed, or permitted a discharge during the period
7 April 2, '92 through 12/30 of 2003: One, a 1992 letter
8 sent to Tom J. Fatjo, Jr. from the shareholders of MIMC,
9 and that's Plaintiffs' Exhibit No. 145; and second, the
10 1968 board minutes of MIMC, Plaintiffs' Exhibit 143. So
11 Harris County has, thus, put before you the basis for
12 over a decade of alleged civil penalties with merely two
13 documents, each of which contain only one relevant
14 paragraph, as they have submitted them.

15 The 1992 letter, you'll recall, to
16 Mr. Fatjo stated, in relevant part, that the company
17 owns land adjacent to the San Jacinto River and
18 Interstate 10, which at one point was used for certain
19 of the waste disposal activities of the company.

20 The letter went on, "With respect to such
21 land, the Company has received no notice regarding a
22 pending or threatened liability or administrative action
23 under any Environmental Laws and, accordingly, no
24 liability has been accrued on the Audited Financial
25 Statements or the Interim Pro Forma Financial Statements

1 therefor. It should however be noted that due to the
2 expansive nature of the Environmental Laws, the Company
3 may at some point incur a liability under the
4 Environmental Laws with respect to such land." You are
5 intimately familiar with that language; secondly, the
6 '68 MIMC board minutes, which again indicates the
7 discussion then turned to certain real estate owned by
8 the corporation on the San Jacinto River, etcetera.

9 These two pieces of evidence, we submit,
10 comprise Harris County's entire case against GCE. Most
11 importantly, we would point out to the Court for -- what
12 they did not say. First off, they were not put on and
13 presented by any witness that provided any of the
14 context, that provided any indication of when or by whom
15 these may have been, if they ever were, viewed by any
16 representatives of GCE, that what their reactions were,
17 what the circumstances were of any response, if they
18 were viewed, at what point in time they may have been in
19 any of the company's records, etcetera. There was no
20 witness whatsoever to even provide any of that type of
21 background. That is left solely for what they hope will
22 be lawyer argument for closing.

23 Likewise, none of -- the '68 minutes and
24 the 1992 letter, Your Honor, did not explain that had
25 Mr. Fatjo looked, no MIMC property records would be

1 found for the land. It was actually -- it contained a
2 document they point to contained what we now know and
3 what later evidence showed in the case was a
4 misstatement of fact, which would have deflected tension
5 away from even the notification of any ownership of the
6 land, had it been something that someone at GCE looked
7 at at a point in time, which is, itself, a matter of
8 pure speculation and unproven.

9 Secondly, these documents do not describe
10 the nature of the generally described waste disposal
11 activities. They did not indicate that the material
12 disposed of was waste paper mill waste. They did not
13 identify the material disposed of as hazardous or as
14 containing dioxin and did not notify Fatjo of any
15 occurring or potential discharge. Instead, the letter
16 indicated that no actual or even theoretical
17 environmental liability currently existed with respect
18 to the land.

19 Harris County necessarily contends two,
20 what we submit are innocuous, paragraphs cited above are
21 sufficient to show that GCE "caused, suffered, allowed,
22 or permitted" a discharge of dioxin for every single day
23 for the next decade. Harris County is wrong, we submit.
24 First, there has been no evidence presented that GCE
25 ever received or saw the '68 board minutes. They just

1 offered the document through another document --
2 document-reading witness, if you will.

3 But even if it had, neither those minutes
4 or the 1992 Fatjo letter get Harris County even off the
5 starting blocks in our opinion. The nationwide case law
6 construing the terms "cause, suffer, allow, or permit"
7 require proof that the defendant, as we have shown you,
8 Your Honor, engaged in some conduct or activity with
9 respect to the site, number one; number two, had some
10 knowledge of the alleged discharges; and three, had some
11 affirmative connection to the site or alleged
12 discharges.

13 And we would remind you and refer you again
14 to the cases that we brought to you, and we brought to
15 you alone, from other jurisdictions that dealt with
16 substantially identical, if not in some instances
17 virtually identical, language to that contained within
18 the statutes.

19 The -- on point particularly was the *Matter*
20 *of Chicago* -- the *Chicago Railroad* case and *U.S. vs.*
21 *Launder*, the Ninth Circuit opinion that we pointed out
22 regarding the federal -- failure to contain a fire on
23 federal land; and thirdly, *Rose vs. Ben C. Hebert*, which
24 is the Beaumont case that we brought on, and *Sandhill*,
25 which was the 2014 case out of Amarillo.

1 The case law, we would suggest, that we
2 have pointed out to you supports the notion that all
3 three of these elements must be established to support
4 liability under this type of language in Texas and
5 elsewhere. Nevertheless, because Harris County has
6 presented no evidence on these elements, the Court
7 should grant an instructed verdict in Waste Management's
8 favor, as long as to "cause, suffer, allow or permit"
9 requires any one of those elements and they remain
10 unproven in the record here.

11 First as to the absence of any evidence of
12 conduct or activity by GCE -- we're still in the GCE
13 Era -- Harris County presented no evidence that GCE
14 engaged in any conduct or activity with respect to the
15 site. In fact, there has been no testimony or document
16 presented to the jury that reflects any conduct or
17 activity of GCE, whatsoever, beyond a mere fact that it
18 acquired the stock of MIMC in 1992.

19 The sole testimony on the matter is from
20 Mr. Rivette, and you will remember they called
21 Mr. Rivette -- can you put that up -- on -- we're going
22 to have to rely on the power of the persuasion of our
23 arguments rather than a PowerPoint, but I have a couple
24 of slides in any event.

25 You'll recall that Rivette twice testified,

1 and this is the only evidence from anyone on this point,
2 regarding -- and he was there as the corporate
3 representative for WMOT -- what Waste Management of
4 Texas knew regarding what actions GC Environmental took
5 in 1992; and he confirmed under oath twice that they, in
6 fact, had no knowledge that -- that Waste Management of
7 Texas had no knowledge of what GC Environmental knew
8 back in 1992 with respect to these documents, or
9 anything else relating to the transaction and ultimately
10 any threat or risk of discharges at issue in the case.

11 You'll recall that in the *Chicago Railroad*
12 case, the plaintiff tried under virtually identical
13 language to impose liability. There the regulator in
14 that case, finding that -- a similar clause which said
15 "'cause, permit or suffer' an environmental statute to
16 include and reflect the traditional version of strict
17 liability as a theory of recovery and that it is based
18 on the idea that a defendant engaged," quote,
19 "'...engaged in some kind of activity' which exposed
20 others to a risk of harm and that the activity justified
21 allocating a risk to the defendant."

22 The *Rodriguez vs. Sandhill Cattle Company,*
23 *L.P.*, was the Amarillo case which affirmed a directed
24 verdict on an interpretation of "permit" as to "suffer,
25 allow, or consent," holding that the standard required

1 conduct undertaken by one who failed to act reasonably.

2 Under those cases -- and you'll recall that
3 in the *Matter of Chicago* they attempted to come 50 years
4 later, just as they are here, and impose upon the
5 acquirer of a rail yard liability for the discharges
6 that had gone on over the 50-year period, or occurred
7 beginning 50 years earlier, based solely upon the
8 ownership -- the acquisition of ownership and control of
9 the rail yard; and the court flatly rejected it, saying
10 this is what you would have to prove. And there was no
11 evidence of it there, and there is no evidence of that
12 here.

13 The second point, there is no evidence,
14 we submit, that GCE had any knowledge of the alleged
15 discharges. Harris County presented no evidence that
16 they had any knowledge of any discharges or even the
17 potential for any discharges. Neither of the two
18 documents comprising Harris County's exclusive evidence
19 include reference to or a warning about a discharge or
20 potential discharge, much less a discharge of paper mill
21 waste or dioxin.

22 The sole testimony, again, is from
23 Mr. Rivette on this point, that Waste Management of
24 Texas had no knowledge of what GC Environmental knew in
25 1992. Harris County introduced no other documents,

1 presented no witnesses on, and asked no questions about
2 what GCE knew from '92 to 2003.

3 Harris County presented no knowledge of any
4 discharge or even potential; and they are, therefore --
5 we're, therefore, entitled to a directed verdict on
6 claims on those penalty dates premised on GCE's
7 liability. And we would cite the *Rose* and the other
8 cases, *Launder* and the *Milwaukee Railroad* case for that
9 proposition.

10 Those cases, likewise, have held, as did
11 *Rose*, that interpreting the statutory language "permit"
12 as meaning to "suffer, allow, or consent" and holding
13 that each of these concepts -- quote, "...each of these
14 concepts presupposes knowledge on the part of the person
15 permitting a particular act," discharges here and
16 *Launder* being to the same effect, interpreting the
17 statutory language "permits or suffers" to require,
18 quote, "knowledge, a willingness of the time and
19 responsible control or ability to prevent."

20 Now, the only thing in addition to that
21 that has been provided by the County is the notion of
22 overlapping directors in or about 2002 and certain
23 officers from and after 2001 and later; and we submit
24 that overlapping directors does not indicate knowledge
25 of the 1965 operations or even of knowledge held by

1 directors at GCE back in 1992.

2 Harris County, we've seen, has suggested
3 that evidence of overlapping directors between MIMC and
4 GCE starting in 2002 -- 2001 or 2002 is some evidence
5 that GCE had knowledge of the site. There is simply no
6 evidence, we submit, however, Your Honor, that MIMC's
7 officers in 2002 knew anything about the site to pass on
8 to GCE's officers.

9 As of 2002, the site had not been operated
10 for over a quarter of a century. It had been 10 years
11 since GE had acquired MIMC and nearly eight years since
12 MIMC had any operations at all. Moreover, there is no
13 reason to assume or speculate that MIMC's 1992 directors
14 knew anything about the site beyond what was in the 1992
15 letter to Mr. Fatjo.

16 With no evidence to support the knowledge
17 existed in '92 or that it was transferred among officers
18 over the next decade, it is utterly unsupported
19 speculation that GCE was ever the recipient of the
20 particulars about the site. The overlap of MIMC and GCE
21 directors in 2002, therefore, is irrelevant. The sole
22 evidence of GCE's knowledge about the site remains the
23 general statements in the 1992 letter to Mr. Fatjo,
24 which was, as you will recall, a single paragraph in the
25 document, I believe, in excess of 90 pages long.

1 There is no evidence, thirdly, that GCE
2 otherwise had had any affirmative connection to the
3 site, another element of the cases we have cited to you.
4 There is no document or testimony presented to the jury
5 that indicates GCE ever affirmatively did anything with
6 respect to this site. On this record GCE did not
7 violate the statute. We would again refer you to the
8 *Matter of Chicago Railroad*, noting that in both *Sea*
9 *Farms* and *Nordevan*, the owner is responsible for
10 pollution done on its land by those acting with its
11 knowledge and permission.

12 The court went on to say "It's a far cry
13 from Union Pacific being held liable for pollution
14 caused by Milwaukee Railroad during a half century
15 before Union Pacific bought the land."

16 Now, GCE's ability to replace the MIMC
17 board, we submit, which is another fact in a series of
18 facts that they have relied upon here, is not an
19 affirmative connection as a matter of law. They had
20 Joan Meyer testify, you'll recall, that "As a hundred
21 percent shareholder, I have the right to appoint
22 directors and change them" and that somehow by inference
23 provides some basis of an affirmative connection between
24 GCE and the site. But GCE's right to replace directors
25 of MIMC is not an affirmative connection to the site

1 about which GCE had limited knowledge and never any --
2 directed any conduct.

3 Secondly, and critically, the right to
4 replace directors of a subsidiary, as a matter of law,
5 is not evidence of control over an aspect of the
6 subsidiary's business or operations, period. As the
7 Texas Supreme Court has explained -- it has drawn this
8 distinction in the 1995 case, and I'll hand you up a
9 copy of it in a moment, Your Honor, of *Centeq Realty,*
10 *Inc. vs. Siegler*, 899 S.W.2d 195.

11 And the Court there says -- and it was a
12 case where premises liability was asserted against the
13 owner of a corporation upon which the injury to the
14 plaintiff was sustained, and the question was whether or
15 not proper security by the subsidiary company had been
16 maintained.

17 The Supreme Court said, "We conclude that
18 Centeq's power to elect a majority of the board of the
19 Warwick Council was entirely distinct from the power to
20 control security. The only 'control' wielded by *Centeq*
21 related to its majority vote in electing board members,
22 not to the rendering of decisions affecting security
23 measures. Centeq had no direct power to make security
24 decisions, and consequently, its influence, if any, upon
25 the Warwick Council was too attenuated to constitute

1 'specific control over the safety and security of the
2 premises,'" precisely the point we're making here.

3 And Dr. Bedient testified, you'll recall,
4 on October 21st:

5 "QUESTION: And so Waste Management wasn't
6 in any position to stop anything. It had no
7 relationship and didn't own the stock of MIMC at that
8 point," that is the '70s and '80s and '90s, "correct?

9 "ANSWER: I understand, yes."

10 So in summary on the GCE era, if you will,
11 Your Honor, the sole evidence are the two documents
12 we've described and that lack any detail that would have
13 put GCE on notice of a violation. In fact, they made no
14 showing of any circumstances under which they were
15 reviewed or by whom or what sequence of events is to be
16 -- to be taken from any of the circumstances which are
17 not illuminated in any form of testimony by any witness
18 about the receipt, review, or action, or not, on any
19 such documents.

20 As indicated by the case law we have cited,
21 the statutory language "cause, suffer, allow, or permit"
22 requires clearly more than merely the stock ownership;
23 and the exercise by the parent, as we have shown in
24 repeated cases, starting with the U.S. Supreme Court in
25 what is -- the Court, you'll remember, that was a

1 unanimous opinion, a unanimous opinion led by Justice
2 Souter in which the bedrock principle of the
3 separateness of these corporations is noted.

4 And the implication that they are now
5 attempting to make, that they can put before the jury
6 and make the argument, which is a law argument and, I
7 submit, contrary to the law, so it's a contrarian law
8 argument to the jury, which is where we're headed if
9 they're permitted to proceed with this argument, is to
10 the effect that the fact of the exercise by a
11 shareholder, a controlling shareholder, of the
12 attributes of shareholder and controlling shareholder's
13 rights in and of itself can create any evidence --
14 probative evidence of a right to control here or engage
15 in activities at the site level in the business of the
16 subsidiary.

17 One important aspect of that, Your Honor,
18 in the -- that is related specifically to that, if
19 you'll think about it, the -- we gave you some six
20 Supreme Court cases which have articulated against the
21 bedrock principle led by the *Gladstone* case, which I
22 know you have had a chance to read, but I want to remind
23 the Court again, now that we've seen what the evidence
24 is that they're trying to use as a factual matter to put
25 to a jury to make a jury argument, is a legal

1 proposition that is solely for the Court and not -- not
2 to compel us to be arguing this to the jury. It is
3 contrary, I submit, to the Supreme Court authority of
4 Texas -- of the United States as it relates to these
5 bedrock corporate principles.

6 Creation of affiliated corporations to
7 limit liability, while pursuing cause, suffer, permit
8 and allow goals, lies firmly within the law and is
9 commonplace. We have never held, never held,
10 corporations liable for each other's obligations merely
11 because of centralized control, mutual purposes, and
12 shared finances. There must also be evidence of abuse,
13 or as we said in *Castleberry*, injustice and inequity.

14 That's why I said at the outset -- it is
15 enormously important, as a point of departure, that they
16 have stipulated there are no alterego issues to go to
17 this jury, no veil piercing issues to go to this jury.
18 That is precisely stripped back. That is precisely
19 where we've found ourselves.

20 They are trying to make, take, and create
21 an opportunity, impermissibly I submit, to argue what
22 are contrary to what are the bedrock principles of
23 WMOT's rights to -- to appoint directors and officers of
24 a subsidiary company and generally the right to control
25 at that level as a shareholder. They want to argue that

1 that is evidentiary, coupled with other facts that they
2 have pointed out, which I'll address in a moment, that
3 they can support an evidentiary argument, so that they
4 can get an evidentiary finding to impose liability,
5 contrary to the principles of law we're talking about
6 here.

7 A related bedrock principle that is noted
8 in the *Best Foods* case is that it is a general
9 assumption that when you prove what is undisputed in
10 this record, and that is that we appointed -- Waste
11 Management of Texas appointed certain directors and
12 officers in that 2002 forward period, that it was simply
13 -- it was simply exercising appropriate rights.

14 There is a general presumption that arises
15 out of that evidence that they have cited here that, in
16 fact, those subsidiaries -- these and those are
17 operating solely in their capacity for the subsidiary
18 and not in their capacity for the parents and that you
19 have to, therefore, approve conduct. That's why the
20 conduct requirements come in. You have to overcome a
21 general presumption.

22 The principle that they are articulating
23 and now want to skip, not only to negate the general
24 legal presumption that they would otherwise be subjected
25 to there, they -- where a party -- in order to maintain

1 under general principles of corporate law, maintain the
2 independence of the parent from the subsidiary, it has
3 to refrain from doing exactly what they're claiming here
4 it did. They have no evidence of it.

5 THE COURT: In other words, your position
6 is that the bedrock principles prevent them from doing
7 the very thing they say you should have done, meaning as
8 officers of MIMC should have then told Waste Management
9 of Texas do X, Y or Z?

10 MR. GIBBS: Exactly, because the whole
11 principle -- set aside alterego and veil piercing. They
12 are not a part of this case. The jury has no right to
13 have it implied to them that there is anything here that
14 would permit that, including, by the way, in the face of
15 the fact that this -- this is an absolutely
16 stipulated -- as we sit here, MIMC has stipulated to be
17 a corporation in good standing.

18 You can be a nonoperating entity
19 incorporation and you don't have to have operations.
20 Yet, they're trying to say that the -- that the fact
21 that they had no operations, that operations ceased in
22 '94, is something the jury should consider in
23 determining whether or not we're liable. That's
24 directly contrary to these legal principles.

25 The general assumption -- and I'm going to

1 read it to you. This was out of *Best Foods*; and it was
2 critical because we're being -- we're being not only
3 deprived of it, but the jury is receiving a question
4 that only goes to a judge.

5 It says, "This recognition that the
6 corporate personalities remain distinct has its
7 corollary in well-established principle of corporate law
8 that directors and officers holding positions with a
9 parent and its subsidiary can and do "change hats" to
10 represent the two corporations separately, despite their
11 cause, suffer, permit and allow ownership. Since courts
12 generally presume that the directors are wearing their
13 subsidiary hats and not their parent hats when acting
14 for the subsidiary, it cannot be enough to establish
15 liability here that dual officers and directors made
16 policy decisions and supervised activities at the
17 facility. The Government," the County, "would have to
18 show that despite the general presumption to the
19 contrary, the officers and directors were acting in
20 their capacities as subsidiary officers there in that
21 case and not as the parent officers and directors when
22 they committed those acts."

23 It has to have activities on top of that.
24 In fact, there is a general presumption that you have to
25 overcome in the first place; but that's not -- none of

1 these arguments are arguments -- despite how they want
2 to put them to the jury, these are not jury questions.

3 So we would be deprived under that -- under
4 their theory here, we would be deprived not only of the
5 benefit of that general presumption, but also of the
6 prohibition under bedrock principles of corporate law
7 that if you want to maintain your right, your legitimate
8 right to operate through an independent subsidiary
9 protected from its liabilities, or limited to its
10 asset-based liabilities, you cannot do what they're
11 saying we should have done. And that is go in and take
12 over at a given point in time, even if we knew about it;
13 and there is no evidence we did. You cannot be required
14 -- or you are being required to forfeit and pierce your
15 own corporate veil.

16 So putting all that together, this is a law
17 question. It is not a fact issue. They, I expect, are
18 going to -- from what they have provided to us are going
19 to argue that caused, suffered, allowed, and permitted
20 MIMC's violations of law at the WMOT level included the
21 following facts:

22 WMOT was a hundred percent owner of MIMC;
23 WMOT appointed sole direct -- it sole directors; MIMC's
24 sole director was also WMOT's sole director. They have
25 the same officers; MIMC had no operations since '94 and

1 had had no employees.

2 So what? Those are all stipulated facts.
3 It doesn't make any difference, and none of those
4 constitute a legal basis upon which to impose liability
5 for the -- for the actions or omissions of a subsidiary
6 corporation under any statute, any environmental
7 statute, etcetera, and certainly not under these
8 statutes.

9 He asked the question why does MIMC exist;
10 and the witness said, "I have no idea." So what? On
11 this record MIMC, as they have repeatedly admitted, it's
12 a viable corporation, it's a separate company. It's a
13 nonoperating company, but a separate company.

14 And they said -- so given those factors,
15 they know that they have to come up with some kind of a
16 case that says otherwise against this enormous volume
17 and body of case law in Texas everywhere that says you
18 can't do this and those statutes got to be construed
19 this way, certainly not a statute under the
20 anti-abrogation principles observed in Texas and in the
21 *Best Foods* case.

22 And I gave you those cases the other day,
23 as well, that says if the statute even wants to have a
24 shot of doing that, of capsizing, as I put it, 200 years
25 of corporate bedrock principle, it has got to at least

1 say so. None of these statutes say anything of the
2 sort. It certainly would not be implied.

3 They have submitted, because, again, they
4 know they need to, what they contend is a reference to a
5 case that is -- that purports -- a Supreme Court case
6 that they suggest purports to say that a subsidiary can,
7 in effect -- that on the issue of control a subsidiary
8 and a parent can be treated as one. And they cite
9 *AHF-Arbors, A-R-B-O-R-S, at Huntsville I, LLC, IV vs.*
10 *Walker County Appraisal District*, which is at 410 S.W.3d
11 831.

12 Now, that is a case -- let me just take one
13 moment, if I may, because I think that's what they've
14 suggested and I want to tell you why I think the case is
15 -- it's significant in only one respect not intended by
16 them. It's whether a certain community housing
17 development property tax exemption can be taken by an
18 equitable owner or whether legal ownership is required.
19 That was the ultimate issue.

20 The Arbors were two LLCs and each owned an
21 apartment complex, and the sole member of each was the
22 parent Atlantic. Atlantic was the CDHO. The Arbors
23 wanted to get the CDHO tax exemption as to each -- for
24 its sole member for their apartment projects, for the
25 owner. To do so, they conceded that the entities in

1 that case were indistinct, in other words, totally
2 opposite, the arguments that are being made here.

3 In that case, the parties were -- the
4 parent and subsidiary were saying for the limited
5 purpose of obtaining the tax-exempt benefits of the
6 subsidiary, they were to be treated -- and it was not
7 only not contested, it was affirmatively argued by the
8 two parent parties, which was the parent and the
9 subsidiary in that case.

10 So the court, therefore, said assuming that
11 control, that could render the parent under that
12 situation the equitable owner and it would have the
13 right then to take the tax benefit. When you read that
14 case, you'll see -- to quote the actual language from
15 the case, it says, "Although the Arbors are not
16 TDHCA-certified CHDOs as Atlantic is, they argued that
17 they are indistinct from their parent," the parents said
18 fine, "which operates the apartments through them in
19 compliance with all requirements. For federal income
20 tax purposes Atlantic and the Arbors are treated as a
21 single entity."

22 That case provides no basis to argue that
23 the bedrock principles of corporate separateness and
24 corporate law and/or, importantly, the issue of control
25 is other than as we have said. It was a presumed issue

1 there.

2 So Instructed Verdict Ground No. 2, Harris
3 County has not presented evidence that Waste Management
4 of Texas during the period December 31, 2003 to
5 March 31, 2008, that's four years and three months that
6 we've identified, one, engaged in any conduct or
7 activity with respect to the site; two, had any
8 knowledge of the alleged discharges; or three, otherwise
9 had any affirmative connection to the site and apart
10 from Waste Management's mere corporate ownership.

11 THE COURT: Can I interject one thing --

12 MR. GIBBS: Yes, Your Honor.

13 THE COURT: -- just because we've talked
14 about this in different ways in different parts of the
15 trial; but as I understand it, the penalty period is
16 supposed to end at March 30th, 2008, is it not?

17 MR. WOTRING: That's correct.

18 THE COURT: Just because it's been
19 referenced as March 31st in some places; but I think we
20 all agree it is March 30th, right?

21 MR. WOTRING: Correct, Your Honor.

22 THE COURT: Just for the record.

23 MR. GIBBS: I have observed that it has
24 appeared in both formulations, and I gave them an extra
25 day.

1 Just as we would point out with respect to
2 WMOT, that just as the case with GCE, the same two
3 documents are argued as being basically the only
4 evidence not supported by witness testimony in the real
5 time or any explication of anybody -- of it being
6 received, reviewed, or any action taken or not taken
7 with respect to the receipt of any such documents or, in
8 the case of WMOT, any knowledge that GCE back in 1992
9 had received any such documents or had access to any
10 such documents.

11 The documents remain for the WMOT analysis
12 as benign as they were below, but WMOT is even further
13 removed from them than GCE. Neither was addressed to
14 WMOT. There is no evidence or implication that WMOT
15 ever viewed either document; and there was no evidence
16 or implication that it had some duty, obligation, or
17 even reason to do so.

18 And so for the reasons that we articulated
19 previously here, there is -- as to allege liability
20 incurred by GCE pre-merger, it should also dismiss the
21 case against WMOT post-merger. First, there is no
22 evidence of any conduct or activity by WMOT.

23 Would you put up that -- one of our limited
24 slides?

25 This is the testimony of Mr. -- of Dr. --

1 what is his name? Pardue. Dr. Pardue. And Dr. Pardue,
2 you'll recall for these purposes, Your Honor, was -- he
3 was -- he was sent out to look at documents and to
4 provide a timeline.

5 Oh, this is Bedient, I'm informed. We
6 didn't have it labeled. It's Dr. Bedient; and his job
7 was to, as you recall, be a chronicler of after-the-fact
8 historical documents:

9 "QUESTION: Well, the responsibility for
10 the design -- for the design of the site, that doesn't
11 lie with Waste Management of Texas, you'd agree with
12 that, correct?

13 "ANSWER: I agree.

14 "QUESTION: And that's not something that
15 you point the finger at Waste Management to as far as
16 who abandoned the site in '68, correct?

17 "ANSWER: No.

18 "QUESTION: You would agree with me that
19 you don't believe that Waste Management was responsible
20 for any of the maintenance on the site after '68,
21 correct?

22 "ANSWER: Correct.

23 "QUESTION: And, sir, isn't it true that
24 you have no opinion or information -- no opinion or
25 information as to what Waste Management either did or

1 didn't do," i.e. failed to prevent, "to cause any
2 discharge of dioxin from the site into the river from
3 1965 going forward?

4 "ANSWER: I'm not offering an opinion on
5 Waste Management specifically, no.

6 "QUESTION: Sir, with all the records that
7 you've reviewed related to this site, it's true that you
8 didn't review any records related to Waste Management
9 engaging in any activity on this site starting from New
10 Year's Eve going into '04 until 2008, correct?

11 "ANSWER: Correct.

12 "QUESTION: And you can't point to any
13 activity that Waste Management took with respect to this
14 site at any point in time in what we're calling the
15 penalty period, that is, from 1973 through the end of
16 March 2008, correct?

17 "ANSWER: Correct."

18 Again, this came after he testified he
19 reviewed all these historical documents and had access
20 to all that information for Harris County out there.
21 And that was what he was instructed to do; and he was
22 asked to develop -- he said, quote, "...develop a
23 timeline that things -- what things happened when, who
24 was involved, you know, why did they make that
25 decision."

1 This is their own admission from all the
2 documentation of their own witness as part of his
3 assignment. In short, with this knowledge of the
4 documents and timeline, he affirmatively testified that
5 he could not point to any activity Waste Management took
6 to -- with respect to the site at any point in time in
7 what we're calling the penalty.

8 MR. WOTRING: I'm sorry, Bedient or Pardue?

9 MR. GIBBS: Bedient.

10 Secondly, Waste Management -- there is no
11 evidence Waste Management had any knowledge of the
12 alleged discharges. Again, the sole piece of evidence
13 of Waste Management's knowledge or lack of knowledge
14 here that came in of even the mere existence of the site
15 prior to June of 2005 is Defendants' Exhibit No. 8, a
16 June 6th, 2005 e-mail exchange between Cedilote of the
17 TCEQ and Joe Fisher of Waste Management.

18 You'll recall in that that Mr. Fisher
19 stated, "I checked further with my local field manager
20 and others to gain additional information whether we
21 have ever owned the 20-acre tract near I-10 and the San
22 Jacinto River. None of the people were familiar with
23 the site and none of them believed we ever owned it."

24 In short, Harris County has presented no
25 evidence that Waste Management of Texas had any

1 knowledge of the site, much less the discharge.

2 The fact now of Waste Management and MIMC
3 had the same directors appointed by Waste Management
4 post-merger does not indicate knowledge. Harris County,
5 as we've indicated, has suggested that evidence of
6 overlapping directors between Waste Management and MIMC
7 post-2003 merger with GCE is some evidence that Waste
8 Management had knowledge of the site.

9 First, no evidence connects these directors
10 with MIMC during the time of operations at the site in
11 '65 to '66; second, nothing connects these directors
12 during the time before MIMC completely ceased all
13 operations in 1994; or third, even through 1992, when
14 the shareholder letter was purportedly written and
15 addressed to Mr. Fatjo, in fact, the post-merger MIMC
16 directors were the same individuals that were appointed
17 to be Waste Management of Texas directors by the sole
18 director of Waste Management of Texas.

19 In other words, they were not legacy
20 directors. No evidence in this record indicates these
21 new post-merger directors of MIMC knew anything about
22 the site which they could even hypothetically share with
23 Waste Management of Texas.

24 Finally, the third element, there is no
25 evidence that Waste Management of Texas otherwise had

1 any affirmative connection to the site. Harris County
2 presented no such -- no such evidence beyond the
3 evidence of corporate ownership to connect WMOT to MIMC
4 and, even more tenuously, none to the site.

5 As we've pointed out in the *Centeq Realty*
6 case, stock ownership does not indicate operational
7 control. It is also, it seems to me, worthwhile to be
8 -- for us to be reminded, Your Honor, at the instructed
9 verdict stage, and particularly in a case where we have
10 a couple of exhibits, a couple of documents that have
11 been put in that are substantially vintage, shall I say,
12 and have been unattended by the actual -- by any
13 explication, by any witnesses in the real time or
14 anything approaching the real time as to the
15 circumstances surrounding them, who got them, who read
16 them, what actions were or weren't taken, what
17 communications existed or may not have, the fact that
18 there are no other documents found about a particular
19 subject -- I noticed one thing that has recurred in the
20 absence of any of this affirmative evidence offered ever
21 by Harris County on these various matters is they would
22 adopt the approach of asking the witness, after looking
23 at one of these two documents, "Have you looked -- are
24 there any other documents in effect relating to this
25 subject matter from back in that era?" And the witness

1 would say, "I know of no other documents."

2 That is -- that doesn't mean -- that is of
3 no consequence or no probative value, when you're
4 talking about something from that vintage. There are
5 all sorts of inferences that can be drawn with respect
6 to documents that go by 20, 30, or 40 years among all
7 the records of the business. It may have been that
8 there may have been no activity -- about other activity
9 and that's why there are no other documents that one has
10 found. It may have been there was activity but it was
11 never recorded in the document. A witness could testify
12 about it, but they brought no such witnesses. Or it
13 could be that some of -- some activity did or did not
14 take place or some review was made of it or discussion
15 was had about it and it was documented somewhere, but
16 the document has since been lost or destroyed.

17 We have no -- we are left here with nothing
18 but inference upon inference upon inference; and what
19 they want to do is to simply have those documents in the
20 record and then make lawyer arguments about what are the
21 implications and inferences, lawyers interpreting those
22 bare documents. And I submit that the case law that is
23 thereby implicated are the cases that say that it is
24 absolutely inappropriate for -- and it will not sustain
25 a submission and/or a finding by a jury to submit any

1 fact that is a matter of speculation, in which it is no
2 more than an inference piled upon an inference.

3 And I submit with respect to the documents
4 we have here, that is precisely what we have. For
5 example, in the -- I think it's the *Schlumberger* --
6 yeah. The principle laid down in *Schlumberger Well*
7 *Surveying vs. Nortex Oil & Gas*, Texas Supreme Court, the
8 court there in a proof of conspiracy case, where, of
9 course, you have some latitude to prove by
10 circumstantial evidence things that make up or might
11 prove a conspiracy, but the court laid down that "Even
12 in that broader context or more relaxed context, we may
13 recognize -- we recognize proof of a conspiracy may be
14 unusually -- must be made by circumstantial evidence but
15 vital facts may not be proved by unreasonable inferences
16 from other facts and circumstances, or as has so often
17 been said by this court, a vital fact may not be
18 established by piling inference upon inference," as
19 would be required in this case.

20 And in -- for example, in the case of
21 *Southwest Olshan Foundation Repair Company vs. Gonzalez*,
22 345 S.W.3d 431, San Antonio Court of Appeals, Your
23 Honor, the court there -- it was a case -- a case in
24 which fraud was alleged against a -- by a homeowner
25 against Olshan in connection with some purported

1 representations regarding certain equipment that was to
2 be incorporated in the house.

3 And the -- in the fraud claim, one of the
4 elements is reliance. So the plaintiff there was saying
5 that she could prove her reliance, what she would have
6 done had she been told the truth, she would have done a
7 series of things, a series of sequence of things would
8 have happened, quite analogous to the circumstance here
9 where they are saying, "Well, here is a couple of
10 documents and here -- I want you to assume a bunch of
11 sequential events would have happened if somebody read
12 them or talked to them or examined them and this might
13 have happened, that might have happened."

14 There is a sequence of purely speculative
15 events, and particularly with old documents that far
16 back that have been -- that have not been testified
17 about by a single live human being before this jury to
18 explain the circumstances, or anything else.

19 But in there -- in the analogous
20 circumstances, the court reviewed the series of
21 inferences that would be required to support Plaintiffs'
22 claim that she reasonably relied in not having received
23 the information because of the failure to disclose in
24 that case and said -- the court says, "Instead, the
25 evidence raises the following series of inferences:

1 Olshan knew the system suggested by Linehan was the
2 better system, but Olshan instead decided on its own
3 without discussion with the Gonzalezes to utilize its
4 Cable Lock system; the Gonzalezes would have chosen the
5 more expensive system had it been offered; any
6 representations made to Nelda that the Olshan system was
7 performing as intended were false; and if Nelda had read
8 Couch's or BEC's report, she would have relied upon the
9 reports to her detriment. These inferences amount to
10 impermissible inference stacking. In other words, each
11 inference raised by the evidence would ultimately be
12 premised on another inference. At best, the
13 circumstantial evidence presented amounts to a mere
14 suspicion that Olshan acted fraudulently."

15 And I put those principles before you, Your
16 Honor, because I think in the situation which we have,
17 we find ourselves where they have made these
18 acquisitions but have supported them in -- as it relates
19 to Waste Management of Texas in non-evidentiary form.
20 There is no evidence of the factual types of evidence
21 that would be required to establish liability under a
22 "cause, suffer, allow or permit" type of statute,
23 according to the case law, that there is absolutely no
24 ground upon which they can, as a substitute or surrogate
25 for that, can take what they have shown here are a list

1 of legally permissible things for a corporate parent to
2 do and suggest to the jury, in a case that has nothing
3 to do with alterego, nothing to do with veil piercing,
4 and suggest to them that they can consider that as
5 evidence of control, because that is directly contrary
6 to every case we have been able to find at any level
7 around the country on anything approximating this kind
8 of a claim.

9 So these are not even arguments, I submit
10 again, that can appropriately be compelled, I think, to
11 a jury because they're not -- these are law points. I
12 can't read them, the points out of *Best Food* and the
13 like.

14 So as to those grounds -- those are the
15 three verdict grounds that I wanted to cover with the
16 Court. We submit that at this point in time the Court
17 has indulged and given them every opportunity to
18 demonstrate that there was some set of facts here that
19 would establish activities -- actions by WMOT that would
20 appropriately under these statutes submit it to some
21 kind of liability finding. They have failed to do so,
22 and as a matter of law we submit nothing has been
23 demonstrated or proved to the level of either a
24 scintilla of evidence that should go to the jury on any
25 disputed question of fact under those statutes.

1 Thank you.

2 THE COURT: Thank you.

3 Mr. Wotring, why don't you start out, if
4 you would, and address one of the points that Mr. Gibbs
5 made, which is that, and this is as he's putting it,
6 the, quote/unquote, evidence you're using with regard to
7 WMOT to show that they had knowledge or control actually
8 contradicts what those things mean under the law in
9 other areas, for instance, that somehow by being
10 directors of MIMC and also WMOT, that you can impute the
11 knowledge they have as directors of MIMC to WMOT and/or
12 that you are -- essentially to impose liability on them
13 in this situation, requiring WMOT to pierce their own
14 corporate veil. Even if you don't say that's what
15 you're doing, that's what you're suggesting they should
16 have done in these circumstances to act appropriately
17 and not violate the environmental laws.

18 MR. WOTRING: And the Court has asked a
19 question that in all the hour and five minutes of
20 argument I think was really the only new argument I had
21 heard from counsel for Waste Management; and that is
22 that somehow the control that GCE first, and then Waste
23 Management of Texas, asserted over MIMC to comply with
24 environmental laws would be tantamount to piercing the
25 corporate veil between MIMC and GCE and MIMC and Waste

1 Management of Texas. That, indeed, is a new argument
2 that had never been presented before; and I don't think
3 it's consistent with Texas law.

4 I think we can very much instruct and
5 exercise the control envisioned by these environmental
6 statutes over their subsidiary in this circumstance
7 without subjecting themselves to liability for piercing
8 the corporate veil. We have a very different
9 understanding about what is required to pierce the
10 corporate veil in those types of circumstances.

11 And, you know, I think it's instructive for
12 the purposes here -- that I don't know how many times
13 we've argued about Waste Management of Texas' connection
14 with the case, but it's several times. I don't know how
15 much briefing we've gone back and forth, but it's more
16 than several. And this is the first time we've heard
17 them make the argument that they would have to pierce
18 through to exercise that kind of control, and I think
19 that's simply inconsistent with Texas law about what is
20 required to pierce from MIMC first to GC Environmental
21 and then into Waste Management of Texas. They very much
22 exercise control over their subsidiary to follow the law
23 and comply with the environmental laws, without being
24 subjected to piercing of the corporate formalities in
25 that circumstance.

1 Possibly the other single most greatest
2 difference between --

3 THE COURT: Let me ask you a question about
4 that, if you don't mind.

5 MR. WOTRING: Certainly.

6 THE COURT: One of their arguments, as I
7 understand it, over time has been, well, MIMC is a
8 separate company, so if MIMC isn't complying with the
9 environmental laws, then MIMC will be held liable and
10 Waste Management will ultimately pay the freight for
11 that, because they're a company in which they own a
12 hundred percent of the stock, so you're, instead, asking
13 them to independently and -- to be liable individually
14 for not doing certain things vis-à-vis their subsidiary.

15 MR. WOTRING: The claim against Waste
16 Management is a direct claim against Waste Management
17 for not complying with the law and causing, suffering,
18 allowing the pollution in the San Jacinto River. That
19 is correct. If -- Waste Management of Texas has not
20 made the claim that they're going to stand behind any
21 judgment that might be exercised against MIMC in this
22 case. So that's a little bit of a difference.

23 Perhaps as a matter of being a shareholder,
24 that -- the limit of their liability, I think, as
25 they've expressed it -- I haven't heard them stand up

1 and say that they would be willing to accept any
2 judgment against MIMC in this case and stand behind
3 that, beyond the limits of what they have by virtue of
4 being a hundred percent shareholder.

5 And, you know, we can go back to, well,
6 certainly recitation of all the argument in this case;
7 and we touched upon, I think, the high points of the
8 argument -- the argument that we've heard before and the
9 argument that has come almost full circle. And that is,
10 number one, the Court will remember in June when we
11 started this, Waste Management's argument was that they
12 had a statute, 21.223, that shielded them from
13 liability -- we looked at that statute, and that statute
14 applied to tort and contract cases -- and that as a
15 result of that, *Gladstone's* analysis about that statute,
16 its application in tort and contract cases would not be
17 applicable here.

18 The other statute -- and then we looked at
19 and we have cited several times the cases interpreting
20 "cause, suffer and allow"; and, again, I think we have a
21 fundamental difference with counsel for all the
22 defendants about the scope of that liability and it's
23 not proximate cause, it's not producing cause, it is
24 "cause, suffer, allow or permit." And contrary to, I
25 think, suggestions from time to time, we have provided

1 the Court with the cases interpreting that language and
2 that statute as being one of the broadest phrasings that
3 you can find in statutory language and that would sweep
4 within it many different circumstances, including the
5 circumstances here.

6 Now, from time to time counsel for Waste
7 Management of Texas will suggest that we are -- Harris
8 County is seeking to apply the "cause, suffer and allow"
9 language from the Texas Water Code and other
10 environmental statutes to any controlling shareholder,
11 to any shareholder, to anybody who has a large amount of
12 stock in a particular company; and that's not what we're
13 doing.

14 THE COURT: One of their arguments is the
15 very, as they would say, quote/unquote, facts that you
16 are using to establish their control are the basic legal
17 principles that apply when a company purchases a hundred
18 percent stock of another company and that that's not
19 separate factual evidence of anything and that to the
20 extent you're presenting that to the jury as such, that
21 would require Waste Management to argue the law to the
22 jury.

23 MR. WOTRING: Well -- and in response to
24 that, I would say that the jury is -- I don't want to be
25 trite about this. A jury decides factual issues and the

1 Court instructs the jury on the law, which was why the
2 examination of Joan Meyer was tailored as it was,
3 because counsel argued that the Court would instruct the
4 jury on the matters of the law and how the law applied
5 to the facts in this case.

6 As a factual matter, I don't think there
7 was any real dispute that first GC Environmental and
8 then Waste Management of Texas by virtue of the merger
9 with GC Environmental -- and at some point I guess we
10 need to talk about how this affects that analysis that
11 GC Environmental merged into Waste Management of Texas;
12 but as a factual matter, first for GC Environmental, it
13 had control over MIMC in these circumstances.

14 Again, I'm not going to argue that every
15 time you buy a hundred percent of shares of stock you
16 have the type of control that was exercised with respect
17 to MIMC; but with respect to MIMC, what you have is MIMC
18 has no assets, no employees, no facilities, no
19 operations. It has nothing other than the existence on
20 paper and is completely controlled by first GC
21 Environmental and then Waste Management of Texas.

22 THE COURT: Is that unusual in a situation
23 where a company buys a hundred percent stock ownership
24 in another company?

25 MR. WOTRING: I don't know as a general

1 matter whether that is unusual. I would say, yes, it's
2 pretty unusual for a company to buy a hundred percent
3 stock of another company for, as the record reflects,
4 millions of dollars and then two years later the company
5 has nothing. In terms of the control that is required
6 for the environmental statutes, I think that means that
7 we're not saying and don't have to say, beyond the
8 confines of this case, that anytime you buy a hundred
9 percent of the shares of a stock of a company, that
10 you're attributing liability under the environmental
11 code.

12 And that's not before us, and we're not an
13 appellate court. So we don't have to make those broad
14 statements. We're simply saying in this context as a
15 factual matter, I don't think there is any serious
16 dispute that GC Environmental first and then Waste
17 Management of Texas by virtue of the merger with GC
18 Environmental controlled everything MIMC did, without
19 any -- without any restraints whatsoever.

20 And, you know, counsel made light of the
21 evidence on this particular issue; but the "so what" in
22 response to the "it had no operations, no bank account
23 and a separate existence, no address, no employees, no
24 ongoing business operations and really can't explain why
25 it exists," the "so what" of that is, well, there is no

1 doubt about the fact that GC Environmental first and
2 then Waste Management of Texas controlled MIMC.

3 And the statute that we're looking at has
4 "cause, suffer, allow or permit" language that is broad
5 enough to sweep within it in these circumstances that
6 type of control and make them liable directly under --
7 under the general prohibition of the Spill Act and under
8 the Solid Waste Disposal Act.

9 They talk about corporate bedrock,
10 corporate principles. I have heard that a number of
11 times --

12 THE COURT: Just for your record, we're not
13 talking about the Solid Waste Disposal Act when it comes
14 to Waste Management of Texas.

15 MR. WOTRING: That's correct. The Court
16 has said that does not apply here. So we are talking
17 about the General Prohibition and the Spill Act.

18 With respect to the bedrock corporate
19 principles, those apply in tort and contract cases. The
20 bedrock corporate principles that we're applying in
21 Texas, first we have the Statute 21.223 that I think is
22 the Texas Business Commerce Code that was discussed in
23 June. Well, that doesn't apply here because that only
24 applies to tort and contract cases, not to penalty
25 actions brought by one arm of the government against

1 Waste Management of Texas in these circumstances; and
2 that's -- that's why the *Gladstone* analysis doesn't
3 apply in this case.

4 THE COURT: One of the things they have
5 raised is they think you are changing the general
6 principle, which is that when you have a company like
7 Waste Management of Texas that appoints directors to the
8 subsidiary and the same people are directors of Waste
9 Management of Texas, that when they're wearing their
10 subsidiary hat their duties is to the subsidiary and not
11 the parent, that you're changing that principle by the
12 way you're presenting this case by suggesting that
13 somehow because they overlapped, that those people have
14 to use that knowledge from MIMC to tell Waste Management
15 to do something.

16 MR. WOTRING: Well -- and let me go back to
17 the bedrock corporate principle which they repeatedly
18 reference and talk about. The bedrock corporate
19 principle, again, is with regard to tort and contract
20 liability, not liability for civil penalty actions.

21 THE COURT: You don't think that's a --
22 just a general corporate law principle across the board
23 as to who owes what duty in those situations --

24 MR. WOTRING: We have not --

25 THE COURT: -- from a fiduciary standpoint?

1 MR. WOTRING: From a fiduciary standpoint
2 in a tort context, a contract context, perhaps. But
3 when you try and find where is that general corporate
4 bedrock principle, first we get into the -- that is
5 certainly not prohibited by the statute, cannot be set
6 aside by the statute, and we get into whether that is
7 common law statute or common law or statutory and
8 whether the civil penalty action can set aside that
9 bedrock principle.

10 THE COURT: And really where I'm coming
11 from on that is -- I understand your argument about the
12 -- whether it applies or not; but if I'm someone who is
13 in that position and I know that under general
14 principles of corporate law what my role is when I'm
15 wearing that subsidiary hat, how do I make the
16 distinction between that general corporate principle
17 that I'm supposed to follow and over here where there
18 might be an environmental statute that could apply and,
19 therefore, so I'm supposed to violate that general
20 corporate principle because now we're talking about an
21 environmental statute? How do I make that distinction
22 as someone who is an officer of both?

23 MR. WOTRING: If you are an officer of
24 both, I would -- I would say that both corporations need
25 to comply with civil penalty laws with respect to

1 environmental statutes in the State of Texas. And what
2 we think we are required to establish -- to establish
3 Waste Management of Texas' liability through GCE
4 Environmental and Waste Management of Texas is that they
5 had control over MIMC, it could cause, suffer and allow
6 MIMC to have this control.

7 They're the ones that engraft onto that,
8 well, they had to have actual knowledge. They're the
9 ones that engraft onto that, well, they had to have
10 actual operations at the site. They're the ones that
11 engraft onto that because -- the requirements, which we
12 don't think are part of the statute and certainly not
13 part of the statutory language, itself, that gets us
14 back into the case law and the briefing on the case law
15 that both sides have submitted to this Court.

16 So if they're going to say, well, you have
17 to show actual knowledge, then we get into, well, you've
18 got your interlocutory board of directors; and I can put
19 up my PowerPoint slide on showing that, where you would
20 have knowledge from both companies.

21 Even without that --

22 THE COURT: So one of your points is that
23 "I didn't really need those two documents. Those are
24 more addressing the issue they're making about
25 knowledge" --

1 MR. WOTRING: Correct.

2 THE COURT: -- "that just by virtue of
3 the -- all those other circumstances and facts, we
4 believe we have shown enough," meaning Harris County,
5 "to establish control"?

6 MR. WOTRING: Correct. Even without those
7 documents, what the record is now in front of this Court
8 is we have MIMC in 1992, because we're talking about '92
9 forward with the purchase of the stock by GC
10 Environmental -- at that point in time the only evidence
11 in the record, the movie that we have in front of us and
12 in front of the jury, the only asset that MIMC had was
13 this dumpsite.

14 So for GCE to suggest that they didn't know
15 what it was, what it was buying, that's not -- certainly
16 not -- I don't even think we have to raise an inference
17 on that. To the extent they even have knowledge about
18 what this site was, to impose liability under the
19 environmental code, you certainly had it by buying a
20 company with one asset; and that one asset is this
21 dumpsite.

22 MR. GEORGE: And additional -- the
23 McGinnes' son -- Virgil's son was there at the
24 beginning, and he went to work for GCE. If you'll
25 remember the consideration -- we can show you that slide

1 if there's any dispute -- was that \$20 million and a job
2 for him. He carries that knowledge into the company,
3 and so that knowledge was carried. The employees of GCE
4 had all that knowledge.

5 MR. WOTRING: And we would have to go look
6 at the transcript exactly about what -- what Joan said
7 with respect to the consideration on that because we did
8 alter the slide that I have, which is why we're not
9 showing it through that respect.

10 But if you want to require knowledge, we
11 have evidence of the knowledge even without the two
12 letters, which are -- are -- you know, have been
13 maligned here today. I understand why counsel wants to
14 go after those two letters; but what you also have is
15 the surrounding facts and evidence, which is that MIMC
16 had one asset when the stock was purchased by Waste
17 Management of Texas, this site, and when GC
18 Environmental was merged into Waste Management of Texas,
19 it had a hundred percent of shares of -- well, it owned
20 a hundred percent of MIMC, which had no ongoing assets
21 and had one site in its inventory of assets and no other
22 ongoing business activity.

23 So if you want a "know" or "should have
24 known" about this site, "know" or "should have known"
25 about the issues, I think that that is sufficient.

1 Again, we don't think that's required here. We think
2 it's sufficient to show that they had the ability to
3 cause, suffer, allow, or permit ongoing violations of
4 the Texas Water Code.

5 And, again, I don't think that we've seen
6 the briefing or the argument with respect to the "had
7 they done what they were supposed to do," which is
8 complied with the law or require their subsidiary to
9 comply with the law. They're piercing the veil, and I
10 think that's a very difficult and, frankly -- that's a
11 difficult argument to see how you could make it
12 consistent with, you know, the fact that corporations
13 should comply with environmental statutes and that if a
14 parent were to require a subsidiary to do that, that
15 would somehow create or expand their vicarious liability
16 for their corporation.

17 On the contrary, what we would submit by
18 Harris County is that this statute requires in these
19 circumstances, with this type of ownership structure
20 between Waste Management of Texas and MIMC, for Waste
21 Management of Texas and GCE to have stopped the ongoing
22 violations and pollution in the San Jacinto River.

23 I don't know -- frankly, there was an hour
24 and five minutes of argument with respect to Waste
25 Management of Texas' liability. We have substantially

1 briefed on the case law issues and the interpretation of
2 the "cause, suffer, allow, or permit" language
3 previously; and, again, the only new argument I think
4 that we heard was with respect to the exercising of
5 control that somehow requires a piercing of the
6 distinction between MIMC and Waste Management of Texas.

7 You know, the Charge that Waste Management
8 of Texas has submitted and that they're arguing for has
9 as its definition "cause"; and I'm looking at the Waste
10 Management of Texas briefing from counsel of
11 October 2nd, 2014, entitled "Waste Management, Inc. and
12 Waste Management of Texas, Inc.'s Bench Brief Regarding
13 Jury Instruction for Cause, Suffer, Allow or Permit."

14 I think to define "cause" means to bring
15 about effect, make something happen; and that is -- that
16 is -- to the extent the Court is going to give a broad
17 definition, I don't think there is any question that
18 Harris County has raised more than a scintilla of
19 evidence that Waste Management of Texas through GC
20 Environmental and itself caused, suffered, allowed, and
21 permitted ongoing violations of the environmental
22 statutes, requiring their conduct to be submitted to the
23 jury using whatever appropriate instructions the Court
24 needs to give to clarify the law on this particular
25 issue.

1 THE COURT: Thank you.

2 Mr. Gibbs.

3 MR. GIBBS: Again, just to respond to the
4 very few points they did respond to, I would just say
5 that we're not raising from our perspective, first off,
6 for the first time any of these corporate governance
7 principles. We have articulated repeatedly that these
8 bedrock principles are -- they would be necessarily
9 capsized, as I had repeatedly and probably
10 over-tiresomely repeated, would be -- would be negated
11 by the interpretation. That's why none of the cases --
12 none of the cases they cite say what they claim is the
13 interpretation that they're advancing here.

14 In fact, we are not saying that we are
15 corporate -- that we're veil piercing. We're saying
16 that implicit in what they're now arguing, contrary to
17 their stipulation that we wouldn't be anywhere near
18 alterego, veil piercing in this case, that's de facto.
19 If you peel it away, we can see that's what they're
20 doing, except that they're, on top of that, taking what
21 is a law argument and suggesting that the parties ought
22 to make that, contrary to these legal principles,
23 nonetheless be arguing those legal principles and those
24 legal rights, attending stock ownership to the jury on
25 -- as a predicate for whether we're liable or not on

1 those legal principles, as a matter of a factual
2 finding. It makes no sense, and they have given no
3 suggestion that that's appropriate.

4 The notion that this is somehow -- that
5 these principles -- these bedrock principles apply only
6 in tort cases, I would remind counsel that *Best Foods* is
7 an environmental statutory case, which is the main
8 opinion which says these bedrock principles apply in the
9 statutory context. Yes, they're all rooted. As the
10 cases that we cited to you that look at this very
11 precise kinds of language, they are saying just like in
12 strict liability in tort, that's what these statutes are
13 premised upon. You asked exactly the right question.

14 These are tort-based principles that
15 underlie these statutes. And so just like in *Best*
16 *Foods*, it was a regulatory environmental statute to
17 which these bedrock principles apply. That is
18 absolutely a baseless response.

19 And you asked the question again about the
20 fiduciary duty. Frankly, the reason why there are no
21 cases cited, and now no evidence responded either in
22 support of any of the legal theory of liability, based
23 upon stock ownership, control, and certainly not the
24 ability to use those legal premises to go to a jury on
25 it, or the factual elements of any tort-based theory

1 upon which one could reasonably rely, shows that there
2 is, as we've suggested, Your Honor, no basis for them to
3 appropriately have this case submitted to a jury and
4 subject a private citizen or a company to liability of
5 the type that they are arguing for here on the basis of
6 the threads that have now, I submit, been severed.

7 THE COURT: Will you address the issues
8 raised by Mr. Wotring about, well, this is a little
9 different, this isn't just a hundred percent stock
10 ownership, there is no business, no -- no -- nothing
11 going on with MIMC, and so that effectively that's
12 complete control beyond just stock ownership?

13 MR. GIBBS: Well, stock ownership is --
14 is -- is, in fact, legally control in this circumstance.
15 That's why you own a majority or more of the stock of a
16 company. It's so that you get the benefits of control
17 and you have, correspondingly, the protections of law
18 that says "and there are limits on the liability" that
19 attend that.

20 But, however, how many -- there must be
21 tens of millions of subsidiary companies that are
22 non-operating subsidiaries. Holding companies are a
23 perfect example of it. They don't have operations.
24 They hold some property.

25 By the way, if they intend to tell this

1 jury that this company holds no assets, I don't think
2 that would be true. I think the Court knows that's not
3 a true statement. So I would take it that they wouldn't
4 be taking that position.

5 But the fact that you hold -- a
6 non-operating company holds assets, title, or real
7 estate, or whatever, and its assets and liabilities,
8 that is a matter of routine and by no means constitutes
9 a basis for arguing that because a parent owns a
10 non-operating subsidiary, it owns limited assets, or
11 whatever, that that constitutes a basis for, again,
12 avoiding the bedrock principles that we're talking about
13 here is baseless; and that's why there are no cases that
14 suggest it.

15 It would have radical impacts on business
16 in this country for all kinds -- we've already gone
17 through all those cases -- I won't go back through
18 them -- that look at these statutes, and they draw on
19 case law that talks about corporate parents versus their
20 subsidiaries and the subsidiaries are engaged in some
21 kind of potentially dangerous activities. There are all
22 kinds.

23 Environmental risks and -- to third parties
24 and the like are not the only kinds of dangerous
25 activities that subsidiaries routinely engage in. Those

1 considerations are applied in a wide variety -- as the
2 Ninth Circuit says, across trades and industries and the
3 like; and it was looking at statutory liability there on
4 this same kind of language. And they said, you know,
5 that's why these are rooted in the tort-based principles
6 of controlling risk that may cause harm to people, the
7 environment, or whatever the subject matter may be.

8 So it is -- it is absolutely no response to
9 suggest that because you hold a non-operating -- the
10 amount of assets of a company that's held as a
11 subsidiary is an answer -- the question you put to him;
12 and if you want to take the position that it's being
13 operated for an improper purpose, that's different.
14 That's veil piercing.

15 They have disavowed veil piercing in this
16 lawsuit, period; and they are trying to come around,
17 having done that, and backdoor an argument to the jury,
18 based upon legal principles, that here these attributes
19 of this company somehow, or this subsidiary, ladies and
20 gentlemen, are wrong, improper, or they ought to get
21 liability imposed upon them because of these factors,
22 these facts. And that's the reason we have outlined
23 here in the case law that just doesn't -- that doesn't
24 hold water.

25 MR. REASONER: And if I might just add to

1 that, Your Honor, if I may. Obviously, the premise
2 counsel was throwing out earlier that there was only one
3 site, everyone in this room, including him, knows to be
4 false. We know that the Hall's Bayou existed and the
5 reasons that that's out of the case.

6 He has not pointed to any additional
7 evidence, other than the two documents Mr. Gibbs talked
8 about; and it is the most incredible inferential
9 pyramid, if there is such a thing, he's trying to ask
10 you to allow the jury to build.

11 He's trying to say, well, let's imagine
12 someone saw this paragraph among the 50 pages and, even
13 though there's nothing in there that would create alarm,
14 they got alarmed. And let's imagine that they went out
15 and investigated it, and let's imagine that they weren't
16 thrown off the scent by not finding anything in the
17 property records. And let's imagine that they -- so you
18 go so far down a road of inference that you can't look
19 back, and that's what they're trying to put before this
20 jury. And the cases that Mr. Gibbs point to tell you
21 that's not proper, that's not allowed in any way, shape,
22 or form.

23 They also point to -- Mr. Wotring said,
24 "Well, Waste Management of Texas has not agreed to step
25 up and stand behind any judgment against MIMC." This is

1 not an exercise or a game to see where you can find
2 money. This is -- we are here -- they have put on their
3 case; and this Court has given them every opportunity to
4 do so, every opportunity. And we're here to evaluate
5 the evidence they put on.

6 There is not a shred of evidence under the
7 applicable law that should allow this case against Waste
8 Management of Texas to go to this jury. The notion that
9 this is a super statute that can turn everything on its
10 head in 200 years of corporate law, number one, there's
11 no intent that that was the case, I assure you; but
12 number two, more importantly, the cases say it's got to
13 say that. It's got to say that you can be liable under
14 this regardless of any corporate separateness or any
15 applicable law. It doesn't say anything like it.

16 Thank you, Your Honor.

17 THE COURT: Mr. Wotring.

18 MR. WOTRING: Let me work backwards through
19 this. With regards to the issue --

20 MR. CARTER: Your Honor, may I be excused?

21 THE COURT: Yes.

22 (Whereupon, Mr. Carter left the courtroom)

23 MR. WOTRING: With regards to the issue of
24 whether Waste Management is going to step up and stand
25 behind MIMC in response to a question by the Court,

1 they're going to limit their liability according to
2 their exposure as a shareholder.

3 In terms of Hall's Bayou being in this
4 case, Hall's Bayou is not in this case. The evidence at
5 defendants' insistence is limited to the fact that MIMC
6 had ongoing operations, I think is in the record, until
7 1994 that only had one site, and so that GC
8 Environmental and Waste Management of Texas would have
9 known that MIMC only had one site because the evidence
10 of the other site has been excluded.

11 Yes, I will recognize that there was
12 another site. I'm happy to put that evidence in front
13 of the jury, but that's not where this case has gone.
14 And so for the record in this case, if you need
15 knowledge or you need a notice requirement for "cause,
16 suffer and allow," that comes by virtue of the fact that
17 MIMC only had one asset, this site.

18 MS. HINTON: Your Honor, I have to
19 interject here.

20 MR. WOTRING: Well, I would rather finish
21 the argument --

22 MS. HINTON: I'm sorry. But on the one
23 site issue, we're going down a road that that's not what
24 this case is about and that's not what that jury has
25 heard. This Court has limited discussions relating to

1 one site. This Court has not instructed or ordered that
2 MIMC only had one site.

3 We're discussing one facility, and we
4 cannot talk about other operations. But they cannot say
5 to this jury that MIMC only had one site. That has not
6 been the intent of the rulings by this Court.

7 THE COURT: Mr. Wotring.

8 MR. WOTRING: Well, that has been the
9 evidence that has gone on and that has been the evidence
10 as put on yesterday with Mr. Golemon's testimony, that
11 there was one site, although they had ongoing
12 operations.

13 I don't think that is a central argument in
14 this particular context, but they're the ones --
15 defendants are the ones raising the issue about they're
16 requiring a notice. And with or without the two
17 letters, there would be notice by virtue of the fact
18 that the only evidence in this record is that MIMC had
19 one site and that MIMC had ongoing operations, I think,
20 until about 1994.

21 With regard to the radical impact on
22 corporate law and the bedrock principles, you know,
23 those bedrock principles go to, again, contract and they
24 go to tort cases and don't extend to environmental
25 cases. And if I can go back to the *Best Foods* case

1 where we started in June of 2014, on June 24th we argued
2 about the *Best Foods* case. That is a CERCLA case; and
3 if it stands for anything, it stands that you look to
4 the parent's conduct separate from the subsidiary and
5 the fact that you have a parent and a subsidiary
6 involved together doesn't mean the parent is outside the
7 scope of CERCLA liability.

8 *Best Foods* is not useful in one respect
9 because it has the discussion about veil piercing and
10 when veil piercing is permitted; and it deals with that
11 in Footnote 9 of the opinion where it states that "None
12 of the parties challenge the finding of no derivative
13 liability." So they did not have to resolve the issue
14 of what law is used to determine such derivative
15 liability, state or federal. So it has limited
16 application here.

17 What it does stand for is the proposition
18 that the parent's conduct and the subsidiary's conduct
19 have to be looked at separately and independently and
20 the mere existence of a parent/subsidiary relationship
21 would not absolve the parent of responsibility under the
22 CERCLA Superfund analysis.

23 Now, they were looking at the parent's
24 liability with respect to CERCLA, which has the owner,
25 operator, ranger, generator, transporter, which is

1 separate than the "cause, suffer and allow" violation;
2 and I think that if the Court will go back and review
3 the *Best Foods* case, it stands for the propositions that
4 Harris County has advanced in this particular matter.

5 So, you know, the argument that they should
6 get out at this stage three days before the close of
7 evidence is based upon bedrock principles of corporate
8 law that we don't think apply outside a corporate tort
9 and based upon cases that are -- are focused upon those
10 tort principles and limiting liability.

11 One more -- one more issue I think is
12 important, one more distinction, which is they're
13 arguing that we're trying to pierce by a different name.
14 Well, we're not trying to pierce. We're not trying to
15 pierce and make Waste Management of Texas liable or
16 responsible for the penalty verdict that we anticipate
17 obtaining against MIMC. That's what veil piercing would
18 permit us to do. That's not what we're trying to do in
19 this case.

20 We're trying to hold Waste Management of
21 Texas responsible for its own conduct. That's a
22 distinction that we made throughout the summary judgment
23 pleading and the argument. And I think it bears in mind
24 that they're saying we're simply trying to roll through
25 the corporate formalities; and, no, we're not. We're

1 not trying to hold Waste Management of Texas directly
2 liable for the penalty verdict or judgment we think
3 we're going to get against MIMC. That is a clear
4 distinction on this.

5 I'll let you address the final issue, the
6 case that we cited.

7 Your Honor, if I may approach and hand the
8 Court --

9 THE COURT: Yes.

10 MR. GEORGE: This is the case that, just to
11 give a preview for us, that we -- it's on our slide.
12 This is a case called *AHF-Arbors vs. Walker County*, 410
13 S.W.3d, 831, a recent Texas Supreme Court case. And I
14 think it's important because it addresses the issue of
15 the control that a parent has over a 100 percent
16 subsidiary; and we remember, unlike almost all other
17 statutes in "cause, suffer, allow or permit" the issue
18 is control. If you control -- if you had the power to
19 stop but did not, that gives rise to liability.

20 And this case, briefly, is a -- one company
21 was certified as a community housing development
22 organization, which is a tax-exempt entity, and they
23 own, I guess, low-income housing, or something like
24 that, and they owned two subsidiaries, which each owned
25 the apartment complexes.

1 And under the law you're exempt from the
2 property tax if you are such an entity for the property
3 you own; and the taxing authority said, "Well, you,
4 parent, do not actually own it" -- that was the Atlantic
5 company -- "because you own corporations and those
6 companies owned the property."

7 And the general rule is if you own shares
8 of a company or a company, you don't necessarily own the
9 property in it. The company owns it and you own the
10 company. And so he said, "You may be the tax-exempt
11 organization, but you don't own the property at issue.
12 And the property at issue is owned by companies that are
13 not tax-exempt, so you need to pay the tax."

14 And the Supreme Court of Texas said, "No,
15 that's not correct," because the owner actually had an
16 ownership interest in what they called equitable
17 ownership, that the parent corporation or entity has
18 equitable ownership in the assets of the subsidiary.

19 And the reason is because it has, and this
20 is highlighted on the third page -- fourth page, it has
21 the present right to compel legal title, which actually
22 assures that that entity -- the exempt entity has
23 control. So by owning the shares, a hundred percent
24 shares of an entity, you have the present right to
25 compel that entity to actually give legal title to you;

1 and that is a great degree of control.

2 And then if we turn to Page 839, the
3 highlighted section, that each of the Arbors has
4 managers, those are the subsidiaries and they're the
5 governing authority; but the managers serve at the
6 pleasure of the members, the shareholders. Thus,
7 Atlantic, that's the parent, has complete control over
8 the subsidiaries and equitable title to their property.

9 So before -- before today and they saw this
10 case, Waste Management of Texas has disclaimed the idea
11 of control and Waste Management of Texas has said that a
12 parent's company does not control the activities of the
13 subsidiary, all it does is own the stock and the
14 subsidiary does its own thing, you may be able to
15 appoint a board of directors, but there's a
16 separateness.

17 Well, the Texas Supreme Court said: It's
18 not quite so formalistic. We're going to take a
19 functional approach, a real world approach. We're going
20 to look and see how it really is; and we're going to say
21 because they serve at your pleasure, they've got to do
22 what you say.

23 And that is complete control; and because
24 of that, they're treated the same. And I think it's a
25 common -- the view in the law that you don't get

1 benefits without burdens and vice versa. You can't take
2 the good and not the bad.

3 So in the corporate world, you can have the
4 ownership -- if you own the tax-exempt subsidiary -- if
5 you own the property and you're tax-exempt, that level
6 of control can give you the benefit of the tax
7 exemptions. But, on the other hand, if you own a
8 complete -- have complete control, that control matters.
9 And we're not going to sit there and say, "Oh, you know,
10 you're totally separate, you don't have control."
11 And is this gonna apply very broadly? I don't
12 necessarily think so because most statutes aren't just
13 about control.

14 This is a very broad statute. We all know
15 it's the broadest under the law. So we're already at
16 the kind of -- at the edge of where the law has gone
17 because it's just control. But lest you think that I am
18 making up an argument that no one would ever imagine,
19 the Texas Supreme Court never thought this was going to
20 be applied this way.

21 If you'll turn with me to the next page to
22 Justice Willett's dissent. This is an 8/1 decision.
23 Justice Willett said, "Wait. You can't say this because
24 we've got corporate formalities and by saying that
25 corporations have control and they can get a benefit,

1 you're opening up the possibility that people are going
2 to say that traditional veil piercing isn't the only way
3 that a corporation can be held liable for acts of its
4 subsidiary." And he goes on at great length in
5 Paragraph 2. I've highlighted it.

6 And the Texas Supreme Court majority
7 response by Justice Hecht was, "We don't care. We're
8 not -- yes. Thank you for warning us, but we still
9 believe we're going to look at a real world."

10 And if you have control, you can get the
11 benefits of that control and, of course, the flip side
12 is you have the burden. So we're not making up some
13 argument that nobody ever imagined.

14 The Supreme Court, when they wrote this,
15 were well aware that it was going to be used to show
16 that there may be instances where control -- a company
17 may not want that, you know, what that means.

18 Now, this is not a case where they fell on
19 their sword and said, "You know, we give up. You know,
20 we're all veil piercing; and, you know, we've merged
21 everything together." All they said is, "We have a
22 hundred percent ownership; and that alone means for
23 these purposes we're -- we're not -- you know, we should
24 be treated together."

25 And the Supreme Court 8/1, two years ago,

1 said that. I think that's very important because it
2 definitely rebuts the idea that a parent corporation
3 does not have control over the subsidiary to the extent
4 that it has real legal consequences.

5 MR. GIBBS: May I approach, Your Honor?

6 THE COURT: You may.

7 MR. GIBBS: A pretty simple response. The
8 argument that counsel has just made completely attempts
9 to conflate the notion of the right as a shareholder --
10 one of the attributes of being a controlling shareholder
11 is that, yes, you can control the assets of the
12 subsidiary, of virtue of the right to vote that they
13 sell the assets. You can't defraud the MIMC creditors,
14 obviously, and all of those people, but you can cause
15 because of your right of control sales of the assets.

16 That is an entirely different concept from
17 you have a right to get in and control the day-to-day
18 business activities for purposes of running those
19 activities, for purposes of dominating or subordinating
20 all of the board members and the directors. Those are
21 two entirely different propositions.

22 And if I can direct your attention to
23 Page -- it's Page 5 here on my copy of the *AHF* case that
24 counsel was just reading there, you'll see, as I have
25 indicated, as I've highlighted there, in that case the

1 two protagonists were both saying "We're here
2 conflating. We're both arguing we're one and the same
3 company"; and the legal effect of that is that the
4 parent, which is equitable titleholder of the asset,
5 that asset of the subsidiary, when you conflate the two,
6 you rejoin -- in a fundamental matter of property law,
7 you join -- rejoin the equitable and legal title in one.
8 And, therefore, for the limited purpose here of having
9 the right to the tax-exempt benefits of the subsidiary,
10 they said that was appropriate.

11 They weren't deciding any issue that was --
12 that was contrary to the bedrock principles, the same
13 Supreme Court that is in -- *Gladstrong* laid out in 2009,
14 no suggestion that that was the intention on a case --
15 in a case in which those two things -- those two
16 interests were conceitedly conflated.

17 They had done their own veil piercing.
18 They both argued that; and they were arguing that in
19 doing that, as they presented themselves to the court,
20 the legal and equitable title were joined together,
21 which justified the taking of the tax-exempt benefit.

22 And I would hand the Court, again, the
23 *Centeq Realty* case and the language that I have read to
24 the Court earlier.

25 THE COURT: Thank you.

1 MR. GIBBS: And I would just cap it off by
2 saying that the only change here is that at this stage,
3 I submit that it is now established in bedrock fashion
4 that neither the case law that they have cited, nor any
5 evidentiary response that indicates that there's a jury
6 issue here under this statute, they have -- they used --
7 as we started this trial, they were denying that they
8 were relying solely on control by virtue of ownership.
9 Now they have come full circle, and that is the only
10 thing that they have retreated to now that they say
11 imposes liability. And they have not shown otherwise on
12 this record.

13 THE COURT: Do you want to address the
14 *Centeq Realty* case?

15 MR. GEORGE: Briefly, on this -- on our
16 case --

17 THE COURT: Yes, sir.

18 MR. GEORGE: -- I think when you read it
19 closely, if you read it at all, it's not based on the
20 fact that they somehow have admitted that they have
21 merged and that they stipulate to it. The Supreme
22 Court is not going to let people get up and just say "I
23 want a tax deduction because of what I say."

24 It analyzes just straight, this is the
25 company, this is what they own, these are the facts.

1 And it was based on the facts, not any kind of, you
2 know, them saying we're altogether.

3 And as *Centeq Realty* -- the first time I
4 think they're bringing it up is right here. So I have
5 not had a chance -- I don't think we were given a copy
6 of it, ourselves. So I can't really address that point
7 right now.

8 THE COURT: It's 899 S.W.2d 195, *Centeq*
9 *Realty, Inc. vs. Siegler*, a 1995 opinion. So I'll let
10 y'all look at that.

11 MR. GIBBS: Your Honor, with that, if you'd
12 like, as I said, we have some other points that should
13 go much faster, I'm pleased to report.

14 THE COURT: Okay.

15 MR. GIBBS: I'll ask Mr. Brian Ross to pick
16 up on the next point.

17 THE COURT: Yes, sir.

18 MR. ROSS: As I indicated earlier, Your
19 Honor, I'm going to address Waste Management of Texas'
20 separate motion with respect to just the Spill Act.
21 We've urged this separately from International Paper,
22 although there are some overlapping issues. We believe
23 we're a little bit differently situated than IP on this.

24 In a nutshell, Harris County has not argued
25 from the beginning, nor now at this stage have they

1 presented any evidence, that Waste Management of Texas
2 was at any time an owner, operator, or person in charge
3 of the facility which, as we talked about before the
4 trial, we think that ends the inquiry and that's game
5 over on the Spill Act claim.

6 As I understood the argument between the
7 County and IP, the County was arguing that IP's alleged
8 ownership of the waste could hook them as some sort of a
9 proxy for being owner or operator of the facility; and,
10 obviously, we don't have a dog in that fight. Indeed,
11 the County is not arguing that Waste Management of Texas
12 owned the site or ever owned the waste.

13 To the contrary, I believe that the
14 County's theory of liability against Waste Management of
15 Texas on the Spill Act hinges on this Section 7.101 of
16 the Water Code, which the Court will recall we discussed
17 before trial; and the County relies on this as kind of a
18 catchall provision to add "cause, suffer, allow or
19 permit" liability to non-primary violators of the Water
20 Code, Section 26.266, the Spill Act.

21 Obviously, the Court will remember, we've
22 taken the position that we don't think 7.101 is
23 available to the County because Section 7.351 of the
24 Water Code specifically limits and enumerates the
25 chapters under which the County can bring suit, Chapter

1 7 not being one of them. We understand the Court has
2 addressed that, ruled on it. We reurge it for purposes
3 of a ruling. I'm not going to belabor it today.

4 Assuming for the sake of argument, however,
5 that the County can bring a claim, so to speak, under
6 Section 7.101, we would nevertheless urge that we're
7 entitled to a directed verdict on the Act for three
8 basic reasons. The first one is an easy one. It's a
9 partial -- a partial ground and we've brought this up
10 briefly before, but I don't think this has been formally
11 ruled upon. That is that Section 7.101, which, again,
12 is the loan hook to arguably assess liability against
13 Waste Management of Texas on the Spill Act, did not
14 exist prior to September 1, 1997. So separate and apart
15 from our other grounds, I think at a minimum the Spill
16 Act claim should be dismissed against us for potential
17 penalty dates prior to September 1, 1997.

18 The second ground is that, obviously, to
19 assess this -- this purported 7.101 secondary-type
20 liability, there has to be a primary violator and,
21 indeed, a primary violation for whatever penalty dates
22 the County seeks to recover for; and allegedly here
23 obviously the only purported primary violator is MIMC.

24 But we would urge, and I expect MIMC's
25 counsel to expand on this, that the County has not

1 presented evidence that MIMC violated Section 26.266 of
2 the Water Code and certainly have not shown or presented
3 evidence that there has been any primary violation that
4 Waste Management of Texas caused, suffered, allowed or
5 permitted.

6 And this is -- largely has been covered by
7 Mr. Gibbs, and I won't go back -- go into all the
8 reasons why they've not alleged sufficiently "cause,
9 suffer, allow or permit" liability, although I will note
10 that, if anything, it's even a tougher standard here
11 because unlike the general discharge provision where the
12 argument is, "Well, all we have to show is that you
13 caused, suffered, allowed or permitted some sort of
14 release or discharge," here they've literally got to
15 show that the cause, suffering, allowing or permitting
16 was -- was to cause or allow the actual violation.

17 In other words, we had to cause a primary
18 violator to violate the statute. That's the way that
19 7.101 is worded and in concert with 26.266. And
20 respectfully, we don't think they've come close to that.

21 And I will let MIMC's counsel address in
22 more detail why they don't get out of the starting gate
23 in terms of an actual primary violation for MIMC, for
24 all the reasons, including but not limited to, MIMC,
25 itself, was not an owner, operator, of the facility

1 during the dates in question of the -- of the Spill Act.

2 Finally, we would move for a directed
3 verdict on the Spill Act based on -- and this hasn't
4 gotten too much air time yet, but based on the statutory
5 exemptions of -- for Spill Act liability. Specifically
6 that's in Section 26.267 of the Water Code. This
7 provides an express exemption to liability for any spill
8 or discharge, quote, "resulting from," unquote, and then
9 there's a number of things, including act of God, act of
10 government, or importantly, third-party negligence.

11 Now, as I just said, we don't think there's
12 been any primary violation of the Spill Act at all; but
13 just taking the logic of the County's theory here, what
14 they necessarily have to show, and this is inherent, I
15 think, in any sort of Spill Act theory that -- where
16 they're going after somebody that literally committed no
17 conduct, what the County would have to show is that
18 there is a primary violation by MIMC, i.e., that MIMC
19 somehow acted unreasonably.

20 Therefore, what we believe is that to the
21 extent there is any primary violation, we don't think
22 there was, then that, by definition, resulted from, it
23 doesn't have to be even solely resulted from, the
24 statute just says "resulted from" third party negligence
25 to the extent there was a violation.

1 THE COURT: But wouldn't you have to prove
2 that? Wouldn't the burden be on you to prove the third
3 party negligence for the exemption to apply?

4 MR. ROSS: I don't think so, Your Honor,
5 because the very definition in the -- in the primary
6 violation statute is that the primary violator failed to
7 act reasonably. And so we think it's inherent in their
8 theory that to pin us with a secondary liability for a
9 primary violation, that those elements for a third
10 party -- MIMC to us is a third party. That's the --
11 that's the point, Your Honor.

12 THE COURT: Oh, I thought you were -- I
13 apologize. I thought you were talking about dredging.

14 MR. ROSS: We understand that the Court is
15 not going to give a directed verdict with respect to
16 dredging; but absolutely for any date that there is
17 dredging proven, no doubt about it, that will
18 conclusively establish third party negligence if the --
19 if the -- if the dredging is not reasonable for purposes
20 of where it was planned or anything like that.

21 THE COURT: So your point is more that
22 7.101 doesn't make sense the way they're reading it in
23 conjunction with Chapter 26 because MIMC would qualify
24 as a third party for purposes of the exemption, so it
25 doesn't make sense to hold Waste Management liable under

1 7.101 for MIMC?

2 MR. ROSS: That's one of the many reasons
3 we think 7.101 doesn't make sense here; but to the
4 extent that 7.101 was extended as a baseline catchall,
5 then we would urge that the more specific exemption to
6 this particular statute would trump that general
7 provision here, given the way they've framed the case.

8 THE COURT: Okay.

9 MR. ROSS: So for all these reasons, in
10 addition to and independent of the more global arguments
11 by Mr. Gibbs, Waste Management of Texas would
12 respectfully ask for a directed verdict on the Spill Act
13 claims and, of course, in the alternative, or at a
14 minimum, we would ask for a directed verdict on the
15 Spill Act claims, the penalty dates prior to
16 September 1, 1997.

17 MR. STANFIELD: And, Your Honor,
18 International Paper joins in that motion on the relevant
19 portions, including the point about whether we can be
20 liable for MIMC prior to September 1st, '97, to the
21 extent we're being pursued under 7.101. The issue of
22 primary violation, primary violator, those arguments
23 would apply to us, to the extent they're trying to hold
24 us for MIMC. And, finally, on the statutory exemptions,
25 as well.

1 THE COURT: Can I back up for a minute on
2 the record because I want to be fair to everybody on
3 this. Then we're going to take a break.

4 When I asked that question about, well,
5 wouldn't -- because of the way records look, they're
6 flat when you read them -- wouldn't Waste Management
7 being paying the freight for MIMC, I wasn't intending to
8 imply that they would. I was arguing their argument
9 that you're essentially piercing the corporate veil or
10 suggesting alterego, even though you're not saying it
11 that way, and that, therefore, that's one of your ways
12 of trying to get at Waste Management.

13 So I don't think you responding to that
14 meant that you were admitting that you were just trying
15 to find money in particular locations, which was the
16 suggestion from Waste Management in reply. I was simply
17 taking that argument further to test it in terms of your
18 position with regard to those issues --

19 MR. WOTRING: Yes.

20 THE COURT: -- having to do with your
21 position that you're not trying to pierce the corporate
22 veil.

23 MR. WOTRING: Yes, I understood the Court's
24 line of questions to be that.

25 THE COURT: Okay.

1 MR. WOTRING: I think it probably would be
2 useful to take a break and we can organize our response
3 to the Spill Act, subject to the Court's pleasure.

4 THE COURT: All right. We'll do that.
5 Let's go off the record.

6 (Whereupon, after a break, the following
7 proceedings were had:)

8 THE COURT: Please be seated.

9 MS. HINTON: Your Honor, are we on the
10 record again?

11 THE COURT: Yes.

12 MS. HINTON: For purposes of the arguments
13 that counsel made relating to 7.101, MIMC joins in those
14 arguments, except to the extent of the argument that
15 MIMC is a responsible third party.

16 THE COURT: I understand.

17 MS. HINTON: Thank you.

18 THE COURT: All right. I think we had one
19 more motion for Waste Management.

20 MR. REASONER: Your Honor, no hearing would
21 be complete without a discussion of Chapter 41. So very
22 briefly, very briefly.

23 As the Court will recall me saying at
24 length in the *Forte vs. Wal-Mart Stores* case in the
25 Fifth Circuit, the Court found that where actual damages

1 are not sought, penalties cannot be recovered. It is
2 beyond dispute here that Harris County -- Harris County
3 is -- admits that it is not seeking any actual damages.
4 Therefore, under the proper interpretation of Chapter
5 41.004(a), they are not entitled to recover penalties.

6 Similarly, Your Honor, because of --
7 because Chapter 41.003 applies, the clear and convincing
8 evidence standard is also applicable; and Harris County
9 has failed to present evidence meeting that standard.
10 So we would move for directed verdict on both of those
11 grounds.

12 MR. STANFIELD: Of course, International
13 Paper joins in all aspects of that motion, but at this
14 time is not requesting an interrogatory appeal.

15 MS. HINTON: MIMC also joins in that
16 motion, Your Honor.

17 THE COURT: All right.

18 MR. WOTRING: In response, Harris County
19 would incorporate the legal arguments and authorities
20 that it has previously cited to the Court regarding the
21 inapplicability -- or inapplicability of Chapter 41 to
22 Harris County's civil penalties action in this case for
23 the reasons set forth therein.

24 THE COURT: All right. Are we ready to --
25 Mr. George.

1 MR. GEORGE: *Centeq*, you want me to address
2 that?

3 THE COURT: Yes, that would be great.

4 MR. GEORGE: I did my homework. Yes,
5 *Centeq*, just briefly, is a veil-piercing case. It's an
6 old '95 case, almost 20 years old; and it involves a
7 homeowners association that was alleged not to have
8 provided proper security, somebody was injured, and the
9 Supreme Court said homeowners associations are going to
10 be treated like corporations and veil piercing will be
11 needed to be done, just like corporations.

12 At the time the law was a little different;
13 and if you exercised such control that it was a mere
14 tool or a conduit, it was that kind of control, you
15 could pierce a veil. And they said the fact that they
16 had the ability to elect a majority of board members,
17 not even a hundred percent, wasn't all board members,
18 that didn't rise to the level of being a mere conduit.

19 And, of course, here we're not veil
20 piercing and we're not talking about the type of control
21 that somebody was a mere conduit or just your tool. So
22 I think that's an inapplicable -- it had a nice sentence
23 to pull out of context, but it's not applicable.

24 THE COURT: Okay. Are we ready to move on
25 to MIMC's motion?

1 MS. HINTON: I am. If I may borrow the
2 podium?

3 THE COURT: Yes.

4 MS. HINTON: Good afternoon, Your Honor.
5 Paula Hinton, for Defendant McGinnes Industrial
6 Maintenance Corporation, is requesting that the Court
7 grant an instructed verdict in its favor in all of
8 Harris County's claims pursuant to Texas Rule of Civil
9 Procedure 268.

10 I have attempted, Your Honor, to go
11 through -- we had 23 grounds when the morning started,
12 but I believe I've joined in a number of them. So I
13 will attempt to do my best to only argue those that
14 remain after MIMC has joined in arguments of other
15 counsel.

16 First, Your Honor, MIMC moves for
17 instructed verdict as ground number one that Harris
18 County has not presented evidence that MIMC engaged in
19 any conduct or activity with respect to the site from
20 February 15th, 1973, to March 30th, 2008, a time period
21 for which Harris County seeks civil penalties, that MIMC
22 had any knowledge of the alleged discharges, or that
23 MIMC otherwise had any affirmative connection to the
24 site or the alleged discharges, whatsoever, during that
25 time period. All three of those must be proven by a

1 preponderance of the evidence in order for Harris County
2 to prevail on its claims against MIMC.

3 In its case-in-chief, Harris County has
4 submitted those two documents about which we've had a
5 great deal of discussion, the minutes from 1968 and the
6 1992 Fatjo letter. We do not believe that those
7 documents are sufficient as evidence to create liability
8 on MIMC under these acts.

9 They're most important, Your Honor, though,
10 for what they do not say, not for what they do say. The
11 '68 board minutes and the '92 letter do not explain the
12 fact that no property records could be found conveying
13 the land from Virgil McGinnes to MIMC, or to any other
14 entity for that matter. They do not identify the
15 material disposed at the site as a hazardous substance
16 containing dioxin, and they do not so much as mention
17 the occurrence or the potential occurrence of a
18 discharge from the facility.

19 As this Court has previously held, MIMC is
20 not the record titleholder of the property and, as will
21 be argued more fully later, MIMC is not, and indeed has
22 never been, a beneficial owner of the property.

23 Harris County has contended that the two
24 innocuous paragraphs cited in those two documents are
25 sufficient to show that MIMC caused, suffered, allowed

1 or permitted a discharge of dioxin from the facility
2 every single day for a 35-year time period, following
3 its discontinuance of waste disposal operations at the
4 facility.

5 Harris County is wrong. The courts across
6 the United States have construed the term "cause,
7 suffer, allow or permit" to require proof that the
8 defendant engaged in some conduct or activity with
9 respect to the site, had some knowledge of the alleged
10 discharges and had affirmative connection to the site,
11 or alleged discharges.

12 The in re -- in the matter of *Chicago,*
13 *Milwaukee, St. Paul and Pacific Railroad Company*, Your
14 Honor, and other cases that we have cited to Your Honor,
15 the case law requires that all three of those elements
16 be established to support a finding of liability.
17 Because Harris County has presented insufficient
18 evidence to establish all those elements for the
19 relevant time period, the Court should grant an
20 instructed verdict in MIMC's favor.

21 They presented no evidence that MIMC
22 engaged in any conduct or activity with respect to the
23 site during the penalty period, no conduct. In fact,
24 there's been no testimony or documentary evidence
25 presented to the jury that reflects any conduct or

1 activity by MIMC, whatsoever, at the facility during
2 that time period.

3 They also have presented no evidence that
4 MIMC had any knowledge of the alleged discharges of
5 dioxin. They also, Your Honor, have no evidence that
6 MIMC otherwise had any affirmative connection to the
7 site where the facility was located after disposal
8 operations ceased on May 10th, 1966.

9 It's undisputed that the operations ceased
10 at that point in time, and Harris County has put forward
11 absolutely no evidence to the contrary. No document or
12 testimony has been presented to the jury that indicates
13 affirmative connections to the site during the period
14 for which civil penalties are being sought. In fact,
15 Harris County attempts to argue and does state they
16 contend MIMC abandoned the property, not that there was
17 an affirmative act by MIMC during the penalty period.

18 In short, Harris County's evidence is
19 deficient. There is zero evidence that MIMC had any
20 knowledge of the alleged discharges, much less engaged
21 in any activity or had any connection to the site during
22 the penalty period. As indicated by the case law that
23 the Court has reviewed about "cause, suffer, allow or
24 permit," it requires more. The Court should grant an
25 instructed verdict in favor of MIMC because Harris

1 County failed to present its case-in-chief that MIMC is
2 a non-owner of the property and a former operator had
3 knowledge that would have put it on notice of a
4 discharge during the period from February 15th, 1973, to
5 March 30th, 2008, or that MIMC conducted any activity at
6 the facility during that time period, or that MIMC,
7 itself, had any affirmative connection with operations
8 at the site during that period. For those reasons, Your
9 Honor, MIMC is entitled to an instructed verdict for any
10 liability based on actions or omissions from
11 February 15th, 1973 to March 30th, 2008.

12 Your Honor, I mentioned that with respect
13 to beneficial ownership, which the Court has raised an
14 issue about, we are seeking an instructed verdict with
15 respect to the issue of beneficial ownership. But it's
16 critical for me to raise this issue, Your Honor.

17 In reviewing the law on beneficial
18 ownership -- because I think this case has presented a
19 number of very, very interesting property issues that
20 we've all gone out and dusted off our books on property
21 issues. With respect to the issue of beneficial
22 ownership, beneficial ownership has not been pled in any
23 way, shape, form, or fashion by Harris County in this
24 case.

25 In order to bring an assertion and seek

1 relief for beneficial ownership, the County would have
2 had to have asserted a request for declaratory relief
3 from this Court to declare MIMC as a beneficial owner of
4 the property. That pleading has not been filed. We
5 will not agree to try that by consent and that -- it is
6 fatally deficient for their failure to plead that in
7 this case. However -- so it's clear, we're not agreeing
8 to try the issue of beneficial ownership as a
9 declaratory judgment in this proceeding.

10 I would also point out, too, Your Honor,
11 that in that regard, and as my argument relating to
12 beneficial ownership will point out, it's very similar
13 to the issues we dealt with on presumed deed, presumed
14 conveyance, in that standing is essential.

15 The typical case for seeking a declaratory
16 judgment of beneficial ownership is where a party comes
17 in and seeks for the Court to declare it is a beneficial
18 owner in order to receive some benefit. For example,
19 the Court may be familiar with the *Satterlee*, or
20 *Satterlight* case, where they were attempting to be
21 declared a beneficial owner in order to get tax
22 benefits. There are several cases in that regard, Your
23 Honor, including the *Montana Catholic Missions* case from
24 the U.S. Supreme Court where an Indian tribe attempted
25 to come in and claim beneficial ownership relating to

1 grazing lands to also get tax benefits relating to
2 property.

3 We simply don't have that situation here.
4 The concept of beneficial ownership, as defined by the
5 Supreme Court, U.S. Supreme Court, in *Montana Catholic*
6 *Missions*, relies upon the would-be beneficial owner's
7 right to call upon the courts to enforce the continued
8 beneficial use of the property in question. That's not
9 what's happening here. Once again, we do not have MIMC
10 before the Court seeking to be declared a beneficial
11 owner for that property. That is how beneficial
12 ownership issues come up.

13 Your Honor, in *Satterlee* the Texas Supreme
14 Court in 1978 said, "In terms of real property, the
15 court has defined 'beneficial interest' as a profit,
16 benefit, or advantage resulting from a contract or
17 ownership of estate as distinct from legal ownership or
18 control." And the Court is familiar, in the *Satterlee*
19 case from the Supreme Court, is that they were
20 attempting to be declared a beneficial owner in order to
21 get tax benefits. Typically, Your Honor, it results
22 from a contract or a distinct use where the party
23 attempts to have that declaration.

24 Now, Harris County has also not presented
25 any evidence sufficient to establish MIMC as a current

1 beneficial owner or with an interest in the property.
2 There is no fact issue regarding beneficial ownership on
3 the part of MIMC.

4 They have to present, and they failed to
5 and cannot present evidence, for example, that there was
6 a trust instrument, that Virgil C. McGinnes, Trustee, as
7 the deed reflects -- that there was a trust,
8 potentially, instrument that would convey those rights
9 to MIMC. No such trust instrument exists. And in
10 addition, the Court is aware of the prior briefing about
11 the fact that when this property was acquired, there was
12 no MIMC corporation, there was no MIMC in existence for
13 there to be a trust relationship set up.

14 The conveyance in this case falls squarely
15 within the confines of the Texas Blind Trust Act and
16 can't suffice to create an enforceable trust. MIMC --
17 the *Milner* case, Your Honor, from the Texas Supreme
18 Court in 2012, "beneficial ownership" is defined as a
19 beneficiary's interest in trust property. Here there
20 was no trust. There's no evidence of a trust; and, as I
21 pointed out, the corporation did not even exist when the
22 land was taken in Mr. Virgil McGinnes' name.

23 Harris County has presented no evidence of
24 MIMC's continued use of the property after May of 1966.
25 MIMC operated on the property of Virgil C. McGinnes for

1 a short period of time in 1965 and 1966. There is no
2 evidence before this Court of a trust instrument. There
3 is no evidence even of a lease agreement or whether they
4 operated as a licensee with permission from Virgil
5 McGinnes to operate on the property.

6 They clearly were not, Your Honor, a
7 beneficial owner of the property, as that term is used
8 in the law. If, however, the Court should determine
9 that MIMC was a beneficial owner of the site, which we
10 don't believe it is as a matter of law, from the time
11 period from July '65 to May 1966, MIMC is entitled to an
12 instructed verdict that MIMC's beneficial ownership
13 period ended no later than July 1, 1966, and certainly
14 well before the time of this penalty period in this
15 case, Your Honor.

16 Next, Your Honor, MIMC would move for an
17 instructed verdict relating to the ownership of the
18 sludge. Harris County has presented no evidence
19 concerning MIMC's ownership of the paper mill sludge.
20 First and foremost, Harris County has not established
21 that ownership of the paper mill sludge can be a basis
22 for liability alone.

23 However, even if ownership of the paper
24 mill waste can be a basis for liability, Harris County
25 has not set forth any evidence to establish that MIMC,

1 which was never a record titleholder of the property and
2 is merely a former operator of the site, is the owner of
3 the paper mill sludge that was deposited on the property
4 nearly 50 years ago.

5 The trial evidence here, Your Honor, shows
6 that the paper mill sludge has become permanently
7 integrated into the land. We've seen the photographs
8 that Harris County has offered of trees growing on that
9 portion of the facility, grass over it. It is
10 underground. It is a portion of the land.

11 Because the paper mill sludge has become a
12 permanent part of the property of which Virgil C.
13 McGinnes is the record titleholder, MIMC requests an
14 instructed verdict that MIMC does not own the paper mill
15 sludge and that Virgil C. McGinnes, as the record
16 titleholder, owns the paper mill sludge.

17 As we told Your Honor before trial, we
18 searched for cases on this issue. As Your Honor is
19 aware, typically these issues are handled by contract.
20 However, in this case they were not handled by contract;
21 and we have the unique situation where there is no
22 definition with respect to the parties, a defining
23 contract on the ownership of the waste.

24 However, we do know that this waste went
25 into the facility's property, that the -- with

1 Mr. Virgil McGinnes' knowledge and is now still in that
2 property and became affixed to it, based on the
3 testimony of the experts. Because we have no control
4 over the waste or the property and we are a former
5 operator, we believe we're entitled to an instructed
6 verdict, Your Honor, as to all claims brought by Harris
7 County against MIMC.

8 Your Honor, I believe that we have joined
9 in several arguments made by International Paper and
10 Waste Management of Texas; but for clarification, we
11 also move for an instructed verdict relating to the fact
12 that Harris County has not presented sufficient evidence
13 to prove that MIMC caused, suffered, allowed, or
14 permitted a discharge in violation of the Texas Water
15 Quality Act, the Texas Spill Act, or the Texas Solid
16 Waste Disposal Act.

17 In order to establish a violation of those
18 statutes under the broadest of interpretations, control
19 must be established, meaning that MIMC, not Virgil
20 McGinnes, but MIMC, who is the party here, must have had
21 the power to stop the violation and this control must
22 have existed at the time of the violation. There is no
23 evidence before this Court that such control existed for
24 MIMC.

25 As the Court is well aware, MIMC ceased

1 operations at the facility on May 10th, 1966, and MIMC
2 was not the record titleholder of the property at any
3 point in time; and because MIMC had no connection with
4 the site after its operations ceased, it had no control
5 over the site during the penalty period. As such, MIMC
6 has requested and requests an instructed verdict that
7 MIMC did not cause, suffer, allow, or permit a discharge
8 in violation of the Texas Water Quality Act, the Texas
9 Spill Act, or the Texas Solid Waste Disposal Act.

10 Next, Your Honor, Harris County has not
11 presented evidence that MIMC was an owner, operator, or
12 person in charge after the enactment of the Texas Spill
13 Act on July 19th, 1975. The Spill Act imposes liability
14 only on an owner, an operator, or a person in charge of
15 a facility. MIMC was neither an owner, an operator, or
16 a person in charge during the civil penalty period from
17 February 15th, 1973 to March 30th, 2008. It wasn't an
18 owner, operator, or person in charge of the facility at
19 any point in time after the Texas Spill Act was
20 promulgated in 1975.

21 The Texas Spill Act penalizes owners,
22 operators, and persons in charge; but specifically it
23 does not mention former owners, former operators, or
24 former persons in charge. That language can be
25 contained in other states and other statutes; but it is

1 not contained in the statute here, Your Honor.

2 Harris County has presented no evidence
3 that MIMC had a duty to maintain the site or to take any
4 action with regard to the site after it ceased
5 operations in May of 1966. As this Court heard in the
6 testimony of Mr. Kinnan Golemon, the corporate
7 representative for MIMC, there is no obligation to
8 maintain the site. MIMC operated from the site --
9 operated the site and only maintained those levees
10 during the period of its operations.

11 Next, Your Honor, MIMC requests an
12 instructed verdict that the Texas Solid Waste Disposal
13 Act cannot be applied retroactively to activities that
14 occurred before the operative Solid Waste Disposal Act
15 provisions went into effect in 1975. The liability
16 under the Solid Waste Disposal Act depends on an initial
17 disposal activity and a resulting release or potential
18 release into the environment.

19 It's undisputed, based upon the facts here,
20 that the initial disposal activity giving rise to the
21 Texas Solid Waste Disposal Act claim here occurred
22 before the penalty period and before the effective date
23 of this statute. Passive movement of the waste through
24 the environment does not constitute a disposal activity
25 under the express provisions of the Texas Solid Waste

1 Disposal Act. Therefore, MIMC, Your Honor, requests an
2 instructed verdict that the Texas Solid Waste Disposal
3 Act will not be applied retroactively to disposal
4 activities taking place prior to 1975.

5 Your Honor, MIMC requests an instructed
6 verdict as to Harris County's attorney's fees testimony
7 in that it contends that the attorney's fees expert,
8 Ms. Debra Baker, failed to provide competent expert
9 attorney's fees testimony under *Robinson*. As the Court
10 is well aware, the testimony of an expert must assist
11 the trier of fact to understand the evidence or to
12 determine a fact in issue.

13 Prior to taking the stand to provide expert
14 testimony on the reasonableness of Harris County's
15 attorney's fees, Ms. Baker testified that she had not
16 performed a comprehensive review of the unredacted
17 attorney's fees bills to date. She had minimal
18 knowledge of the work performed by individual attorneys
19 or support staff and failed to review a number of
20 timekeepers -- the number of timekeepers on this matter.
21 In fact, she could not state how many there were or what
22 specifically each had done.

23 That's found -- Your Honor, with respect to
24 her not reviewing the documents is at October 24th, 2014
25 trial testimony at 104, Lines 11 to 14. She testified

1 she feels like she knows what they're doing and that she
2 only looked at the bills each month going back
3 three years. Such is not competent expert witness
4 testimony, Your Honor.

5 She offered to the jury broad and
6 conclusory statements, such as "the fee is reasonable"
7 or "I feel like I know what the timekeepers are doing."
8 Such statements fall far short of the standards set
9 forth in *Robinson* and do nothing to assist the trier of
10 fact in its understanding of the issues.

11 Because of Ms. Baker's failure to meet the
12 *Robinson* standards, MIMC requests an instructed verdict
13 that Harris County's attorney's fees expert failed to
14 provide competent expert testimony. Where an award of
15 attorney's fees is based on testimony which should not
16 have been admitted, the award cannot stand.

17 In addition, Your Honor, in fact, the
18 testimony did not even provide at the end of the
19 testimony, or at any point, a number. They were never
20 provided the number for which they were seeking
21 attorney's fees. We got a general 10.6 and then a
22 discussion of maybe up to 5 percent off, maybe up to
23 10 percent off; but the trier of fact was never even
24 provided with a number to consider as reasonable
25 attorney's fees in this case.

1 For that reason, Your Honor, and others
2 I've stated, MIMC requests an instructed verdict
3 relating to Harris County's attorney's fees.

4 Next, Your Honor, Harris County has
5 presented no evidence to support its position that an
6 entity can recover civil penalties under both the Texas
7 Spill Act and the Texas Solid Waste Disposal Act for
8 violations allegedly occurring during the same time
9 period. Recovery under both statutes for the same time
10 period is impermissible. As a matter of law, Harris
11 County is precluded from recovering civil penalties
12 under both statutes for violations allegedly committed
13 by MIMC during the same time period, and we would move
14 for an instructed verdict on that point.

15 In addition to the previous instructed
16 verdict request, MIMC has requested an instructed
17 verdict that Harris County be precluded from recovering
18 civil penalties under multiple statutes for the same
19 underlying conduct. I believe, Your Honor, IP argued a
20 portion of this; and we incorporate their arguments by
21 reference here.

22 But Harris County has set forth the same
23 violations story for each statute and seeks to punish
24 MIMC for the same acts or admissions -- or omissions,
25 three times over. MIMC contends that it's impermissible

1 to stack the penalties and requests an instructed
2 verdict that Harris County be precluded from recovering
3 civil penalties under all three of the acts at issue in
4 this case.

5 Your Honor, for the record, MIMC -- I
6 believe we have done this expressly throughout the
7 instructed verdict arguments, but MIMC expressly
8 incorporates and joins the grounds upon which
9 International Paper and Waste Management of Texas, Inc.
10 have moved for instructed verdict, except for the
11 grounds relating to whether ownership of the waste
12 transferred from Champion Papers to McGinnes Industrial
13 Maintenance Corporation, as well as whether MIMC is a
14 third party responsible under the Act.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. STANFIELD: Your Honor, International
18 Paper joins in the McGinnes Industrial Maintenance
19 Corporation's motion for directed verdict, in
20 particular, in the elements regarding the fact that
21 there is a knowledge element under the statutes and that
22 that has not been established as to International Paper,
23 that the Solid Waste Disposal Act is retroactively being
24 applied here, if it is applied to International Paper,
25 that Ms. Baker is not qualified and did not properly

1 support attorney's fees, that you cannot overlap the
2 Spill Act and Solid Waste Disposal Act and three
3 statutes should not be applied.

4 MR. ROSS: Just out of an abundance of
5 caution, to the extent that Waste Management of Texas
6 has not already joined those motions in terms of IP
7 bringing them earlier, we join to the same extent
8 Mr. Stanfield just did.

9 THE COURT: Thank you.

10 Mr. Wotring.

11 MR. WOTRING: Yes. Let me work from the
12 back and -- from the most recent backwards. With regard
13 to recovering under the Spill Act and the Solid Waste
14 Disposal Act, I think we've already discussed that in
15 our briefing. At this point in time it is premature for
16 the Court to instruct a verdict on one or both of those,
17 given we don't know what the jury's verdict would be.
18 If there is a multiple award under the Solid Waste
19 Disposal Act and the Spill Act, then we can sort that
20 out by way of an election of remedy post-verdict and
21 address it that way.

22 MR. MUIR: Your Honor, one other point on
23 that.

24 THE COURT: Yes, sir, Mr. Muir.

25 MR. MUIR: That was only applicable under

1 26.268 from 1985 to 1997, that prohibition on recovering
2 under both. So we would contend that for that period,
3 it's an election of remedies.

4 With respect to Waste Management of Texas,
5 since they are not -- we don't have a Solid Waste
6 Disposal Act claim under the Court's previous rulings,
7 the Spill Act would obviously -- we could go forward on
8 that. So just with the clarification that it's for that
9 time period, we think it's an election.

10 THE COURT: Thank you.

11 MR. WOTRING: With respect to the testimony
12 from Ms. Baker on attorney's fees, we think that the
13 testimony was sufficient to support an award of
14 attorney's fees. There was a specific amount given to
15 the jury with respect to the total amount of the fees
16 reflected in the invoices. It was read into the record;
17 and there was a reduction from that of up to 5 percent
18 and up to 10 percent that the jury could -- should
19 consider in reducing those attorney's fees, which is
20 more than a scintilla of evidence about the reasonable
21 attorney's fees that Harris County is seeking in this
22 matter.

23 With respect to counsel's quotations about
24 the conclusory allegations of Ms. Baker in her
25 testimony, those testimonial portions are supported by

1 the foundation that was laid with respect to the
2 attorney's fees. Therefore, we think the motion for
3 instructed verdict should be denied on those grounds.

4 With regard -- with respect to the
5 application of the Solid Waste Disposal Act prior to --
6 and it being applied retroactively, Harris County would
7 refer to its previous briefing on this issue in response
8 to the motion for summary judgment and refer the Court
9 to that particular discussion on the retroactivity and
10 the passive movement of waste. Harris County has fully
11 briefed that and refers the Court back to that.

12 With respect to the evidence that Harris
13 County presented with respect to MIMC, Harris County
14 presented the evidence that MIMC was the -- had
15 sufficient ownership rights of the site to reflect in
16 its August 1968 board minutes that it was the owner of
17 the site, that it had access to the site for the
18 purposes of placing waste there. It continued to
19 reflect that particular information in its 1992
20 shareholder's disclosure letter, which we talked about
21 repeatedly throughout the day, reflecting that
22 throughout the entire period of time MIMC understood
23 that it had the ownership interest in the site --
24 beneficial ownership interest in the site, ownership
25 interest in the site sufficient to go to the site and

1 control the activities there, triggering liability under
2 the Texas Water Code General Prohibition, of the Spill
3 Act, and the Solid Waste Disposal Act. Harris County
4 would refer the Court to its briefing on these
5 particular issues reflected in the summary judgment
6 stage, and certainly after the trial -- in the pretrial
7 phase, as well.

8 There is evidence of continual use of the
9 site post-May of 1966. The board of directors' minutes
10 from 1968 reflect that the site was fully and completely
11 filled with waste material as of that point in time,
12 establishing it was continued to be used past that date.
13 I don't know if that's going to be instrumental for the
14 purposes of this directed verdict, but it certainly is
15 different than as reflected by counsel.

16 Your Honor, beyond that, I would refer the
17 Court back to our arguments and authorities and the
18 response to motion for summary judgment and the lead-up
19 to the trial in which all of these issues were fully
20 briefed and explained. The evidence has come in just as
21 we reflected in those pleadings, and we request that
22 MIMC's motion for direct evidence be denied.

23 THE COURT: Do you want to address the
24 motion for directed verdict on ownership of the sludge?

25 MR. WOTRING: Yes. At this point in time I

1 think there's a fact issue on who owned the sludge at
2 the site. The defendants don't have a coherent story on
3 who owned the sludge at the site, either Champion or
4 MIMC. There is a fact issue on that particular issue.
5 I don't believe there's a fact issue that while it was
6 at the site, MIMC had control over that sludge
7 sufficient to trigger liability under the different
8 statutes under which they have been sued.

9 THE COURT: Ms. Hinton.

10 MS. HINTON: Nothing further, Your Honor.

11 THE COURT: Okay. Does that conclude the
12 motions for directed verdict?

13 MR. STANFIELD: Until TCEQ rests, in which
14 case we'll just have a brief motion on their attorney's
15 fees.

16 THE COURT: I understand. All right.
17 Let's go off the record for a second.

18 (Whereupon, after a discussion off the
19 record, court was adjourned)
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23
24
25

1 THE STATE OF TEXAS
2 COUNTY OF HARRIS

3 I, Kimberly Kidd, Official Court Reporter
4 in and for the 295th District Court of Harris County,
5 State of Texas, do hereby certify that the above and
6 foregoing contains a true and correct daily copy
7 transcription of all portions of evidence and other
8 proceedings requested in writing by counsel for the
9 parties to be included in this volume of the Reporter's
10 Record, in the above-styled and numbered cause, all of
11 which occurred in open court or in chambers and were
12 reported by me.

13 I further certify that this Reporter's
14 Record of the proceedings truly and correctly reflects
15 the exhibits, if any, admitted, tendered in an offer of
16 proof or offered into evidence.

17 WITNESS my hand this the 31st day of
18 October, 2014.

19
20
21 /s/ Kimberly Kidd
22 Kimberly Kidd, Texas CSR No. 2437
23 Expiration Date: 12/31/15
24 Official Court Reporter
25 295th District Court
Harris County, Texas
201 Caroline, 14th Floor
Houston, Texas 77002
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